Petition

NO. 81-2156

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

In re Harrison Sherman Holland, Jr., Carolyn M. Holland, and Sherman Holland Ford, Inc.,

Petitioners,

vs.

Honorable Seybourn H. Lynne, Judge of the United States District Court for the Northern District of Alabama, Southern Division,

Respondent.

ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether this Court should exercise its discretion to issue a writ of mandamus to protect Sherman Holland's seventh amendment rights.

2. Whether the constitutional right to demand a jury trial is created upon amendment of the pleadings which injects a "legal" issue into a previously "equitable" action?

3. Whether, assuming arguendo that the petitioner did waive the right to demand a jury trial, the right to a jury trial is revived upon the subsequent amendment of the pleadings which created new "legal" issues for determination?

4. Whether the district judge abused his discretion in denying petitioner's request for a jury trial in light of the fundamental importance of the seventh amendment?

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LIST OF INTERESTED PARTIES

The only interested party not included in the caption is the Defendant in the trial court, Ford Motor Credit Company, in Civil Action No. CV-81-L-1009-S, United States District Court for the Northern District of Alabama, Southern Division.

OPINIONS BELOW

The order of the United States District Court for the Northern District of Alabama, Southern Division, Case No. CV-81-L-1009-S, has not been officially reported but is contained in the record. (R. 34).

The order of the United States Court of Appeals for the Eleventh Circuit, Case No. 82-7096, has not been officially reported but is contained in the record. (R. 48).

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eleventh Circuit, Case No. 82-7096,

summarily denied petitioner's claim for writ of mandamus on March 31, 1982. (R. 48). The respondent, the Honorable Seybourn H. Lynne, denied petitioner's request for a jury trial on March 3, 1982. (R. 34). This Court possesses jurisdiction pursuant to 28 U.S.C. § 1651(a) (1976).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT INVOLVED

The seventh amendment to the Constitution provides:

> "In suits at common law, where the value in controversy shall exceed Twenty Dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, then according to the rules of the common law."

U.S. Const. amend. VII.

The "All Writs Act" provides in pertinent part:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the

usages and principals of law."

28 U.S.C. § 1651(a) (1976).

Rule 38(b) provides in pertinent part that:

"Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than ten days after the service of the last pleading directed to such issue."

Fed. R. Civ. P. 38(b).

Rule 39(b) provides in pertinent part that:

"[N]otwithstanding the failure of a party to demand a jury in an action which such a demand might have been made of right, the court in its discretion upon motion may order a trial by jury on any or all legal issues."

Fed. R. Civ. P. 39(b).

Rule 57 provides in pertinent part that:

"[t]he right to a trial by jury [in a declaratory judg-

ment action] may be demanded under circumstances and in the manner provided in Rules 38 and 39."

Fed. R. Civ. P. 57

Rule 26 of the U.S. Supreme Court provides in pertinent part that:

"The issuance by the Court of any extraordinary writ authorized by 28 U.S.C. §1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any writ under that provision, it must be shown that the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be had in any other form or from any other court."

Sup. Ct. R. 26.

STATEMENT OF THE CASE

This action was commenced on June 26, 1981, in the Circuit Court of Shelby County, Alabama (Equity Division) by the petitioners, Harrison Sherman Holland, Jr., Carolyn M. Holland and Sherman Holland

Ford, Inc. (hereinafter referred to as "Sherman Holland") for declaratory relief and reformation of a promissory note and mortgage, negotiated through misrepresentation or mistake, against Ford Motor Credit Company (hereinafter referred to as "FMC"), the defendant. The express terms of the note in question called for 59 successive monthly installment payments of $4,614.00 and on the fifth anniversary date of the note, a final installment consisting of the remaining balance of the principal sum owed. The promissory note obligated Sherman Holland to pay the principal sum of $470,000.00, together with interest on the unpaid balance at a rate of 9-1/4% per annum. Both in the negotiation of the note and in the explanation of the closing documents, FMC represented to Sherman Holland that the note was really for a term of 20 years, rather than five years as expressed in the note. In response to Sherman

Holland's question about the "balloon payment", the defendants and/or its agents assured petitioners that the twenty-year commitment had been approved by FMC's home office and that the loan would merely be renewed at each five-year period at the same interest rate amortized over the full twenty-year period. The defendant expressed to Sherman Holland that the five-year term plus "balloon payment" was the custom and practice of FMC "solely for investment purposes". Upon the aforementioned representations, the plaintiffs relied and executed the note and corresponding mortgage.

Sherman Holland sought declaratory relief to determine the rights and obligations under the note and mortgage in question. Ala. Code §§ 6-6-222-to-32 (1975). (R. 2). Petitioners also sought reformation of the note and mortgage in question due to the misrepresentation or

mistake of the defendants pursuant to Ala. Code §§ 8-1-2, 35-4-153 (1975). (R. 2). Petitioners also sought injunctive relief in the form of a temporary restraining order which was issued on June 26, 1981, prohibiting FMC from declaring Sherman Holland in default of said note and mortgage. (R. 19).

FMC removed the case to the U.S. District Court for the Northern District of Alabama, Southern Division, based on diversity of citizenship on June 30, 1981. 28 U.S.C. § 1332 (1976). (R. 20). After pretrial discovery of both parties, petitioners revealed information concerning issues of intentional and/or reckless conduct on the part of FMC. Therefore, on January 8, 1982, Sherman Holland moved to amend the complaint and supplement the pleadings by adding counts for fraud, deceit, fraudulent deceit and bad faith. Ala. Code §§ 6-5-101-to-104 (1975). (R. 28). As to these new

"legal" claims, Sherman Holland simultaneously requested a jury trial for these new "legal" counts. (R. 30). On or about January 21, 1982, FMC filed a motion to dismiss and to strike a jury demand. (R. 32). On March 3, 1982, the Honorable Seybourn H. Lynne granted petitioner's leave to amend to include the counts for fraud, deceit and fraudulent deceit, but denied the limited request for a jury trial. (R. 34).

Sherman Holland sought petition for writ of mandamus in the United States Court of Appeals for the Eleventh Circuit immediately after the denial of the jury demand. (R. 36). On March 31, 1982, the Eleventh Circuit summarily denied petitioner's request for writ of mandamus without opinion. (R. 48).

Sherman Holland respectfully requests that the decision of the Eleventh Circuit be reversed and that a writ of mandamus issue requiring the Honorable Seybourn H.

Lynne to grant petitioner's request for a jury trial. Clearly, the unreasonable denial of petitioner's request for a jury trial by the district judge and the summary deposition by the Eleventh Circuit, forces the petitioners to seek this extraordinary writ in this Court a final arbiter of this sacred constitutional right.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD EXERCISE ITS DISCRETIONARY POWER TO ISSUE A WRIT OF MANDAMUS DUE TO SHERMAN HOLLAND'S INABILITY TO PROTECT THEIR SEVENTH AMENDMENT RIGHTS.

Supreme Court Rule 26 provides that the following factors will be considered in determining whether an extraordinary writ should issue: (1) Whether the writ will be in aid of the Court's appellate jurisdiction; (2) Whether exceptional circumstances warrant the exercise of the Court's discretionary powers; (3) Whether adequate relief cannot be obtained in any other form; and (4) Whether adequate relief cannot be

obtained in any other court. 13 J. Moore, Federal Practice, § 826.02[1] (1981). First, the issuance of the extraordinary writ must be in aid of the Court's appellate jurisdiction. Sup. Ct. R. 26. The exercise of the Court's "general supervisory control" over the federal court system constitutes an "aid" of its appellate jurisdiction. Will v. United States, 389 U.S. 90 (1967) [hereinafter cited as Will]. An unreasonable denial of a jury demand by a district judge presents sufficient basis for this Court to supervise the actions of lower federal courts pertaining to fundamental constitutional rights. Dairy Queen, Inc. v. Wood, 369 U.S. 469, 480 (1962) [hereinafter cited as Dairy Queen].

Second, exceptional circumstances must exist warranting the exercise of the Court's discretionary powers. The exceptional circumstances must amount to judi-

cial "usurpation of power" in order to justify the issuance of an extraordinary writ. Will, 389 U.S. at 95. The judicial disregard of constitutional rights is tantamount to a "usurpation of power". In the case at bar, petitioner contends that the denial of the jury demand erroneously deprived Sherman Holland of his seventh amendment right to a jury trial. Therefore, exceptional circumstances exist to support the issuance of the extraordinary writ. Dairy Queen, 369 U.S. at 480.

Third, adequate relief must not be available in any other form. An order striking a jury demand is not a final judgment and therefore is not ordinarily appealable. Western Geophysical Co. v. Bolt Associates, Inc., 440 F.2d 765 (2d Cir. 1971). The appropriate method to review a denial of a jury demand is the petition for writ of mandamus. Dairy Queen, 369 U.S. at 480. Therefore,

adequate relief is not available in any other form.

Fourth, adequate relief must not be available in any other court. Immediately after the respondent denied Sherman Holland's request for a jury trial, the petitioner sought a writ of mandamus in the U.S. Court of Appeals for the Eleventh Circuit. (R. 36). The Eleventh Circuit denied the petition without opinion. (R. 48). Sherman Holland seeks the issuance of this writ of mandamus as a final request to protect his seventh amendment rights.

II. THE INJECTION OF LEGAL ISSUES BY AMENDMENT TO THE PLEADINGS INTO A PREVIOUSLY EQUITABLE ACTION CREATED A CONSTITUTIONAL RIGHT TO DEMAND A JURY TRIAL AS TO THE NEW LEGAL ISSUES.

A. The Inadequacy of a Legal Remedy when the Original Complaint was Filed Mandated an Equitable Claim for Relief.

The seventh amendment protection of the right to jury trial is the cornerstone

of American jurisprudence. U.S. Const. amend. VII. Sioux City & Pacific Railway Co. v. Stout, 84 (17 Wall.) U.S. 657, 664 (1874). The thrust of the seventh amendment preserved the right to a jury trial as it existed in 1791. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). Federal law determines whether a state-created claim asserted in a diversity case is "legal" or "equitable" for purposes of the seventh amendment. Simler v. Conner, 372 U.S. 221 (1963). The right to a jury trial should be determined by examining all pleadings in the case. Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959). The proper focus is for the Court to evaluate the "nature of the issues" raised by the claims. Ross v. Bernhard, 396 U.S. 531 (1970) [hereinafter cited as Ross]. The "legal" or "equitable" nature of an issue is determined by considering: (1) the custom with reference to such questions

before the merger of law and equity; (2) the remedy sought; and (3) the practical limitations of juries. Ross, 396 U.S. at 531.

All of the issues raised by Sherman Holland's original claims for relief were "equitable" in nature. The original complaint sought declaratory and injunctive relief and reformation of a promissory note and mortgage executed under circumstances raising issues of misrepresentation and/or mistake (R. 2). Rule 57 expressly preserves the right to a jury trial in a declaratory judgment action for issues ordinarily triable to a jury. Fed. R. Civ. P. 57. Declaratory judgments are neither "legal" nor "equitable" for purposes of determining whether a right to a jury trial exists. Wallace v. Norman Industries, Inc., 467 F.2d 824 (5th Cir. 1972). "The right to a jury trial in a declaratory judgment action depends on whether the

action is simply the counterpart for the suit in equity . . . ." James v. Pennsylvania General Insurance Co., 349 F.2d 328, 230 (D.C. Cir. 1965). See also Pacific Indemnity Co. v. McDonald, 107 F.2d 446 (9th Cir. 1939); Conklin v. Barefield, 334 F. Supp. 475 (W.D. Mo. 1971). No right to a jury trial exists if, absent the declaratory procedure, the issue raised in a declaratory judgment action would have arisen in an "equitable" proceeding. Robinson v. Brown, 320 F.2d 503 (6th Cir. 1963), cert. denied, 376 U.S. 908 (1964). In the case at bar, all issues raised by the declaratory judgment action would have been addressed in determining whether an injunction should issue and/or whether reformation was proper. (R. 2). Thus, the declaratory relief was merely incidental to the "equitable" claims for relief. See Owens Illinois, Inc. v. Lakeshore Land Co., 610 F.2d 1185 (3d Cir. 1979); Fizzell v.

Meeker, 339 F. Supp. 624 (W.D. Mo. 1970). Therefore, no right to a jury trial existed for the declaratory judgment due to the "equitable" nature of Sherman Holland's claim for relief. (R. 2).

Claims for injunctive relief are historically "equitable" in nature and no right to a jury trial exists with respect to the issues raised by the injunction. United States v. Louisiana, 339 U.S. 699 (1950). Petitioners were granted a temporary restraining order prohibiting FMC from declaring Sherman Holland in default concerning the note and mortgage in question. (R. 27). At the commencement of this action, Sherman Holland recognized that no right to a jury trial existed for the injunctive relief and therefore did not request one. (R. 2).

A claim that a note should be reformed because of misrepresentation and/or mistake is historically an "equitable" claim.

Touchey v. New York Life Insurance Co., 102 F.2d 16 (8th Cir.), cert. denied, 307 U.S. 638 (1939). No right to a jury trial exists on a claim based in reformation. 9 C. Wright & A. Miller, Federal Practice and Procedure at 82 n. 95 (1971) [hereinafter referred to as Federal Practice]. Upon filing the original complaint, Sherman Holland recognized that no right to a jury trial existed as to the reformation requested, and therefore did not seek the same. (R. 2).

Accordingly, the inadequacy of a legal remedy at the commencement of this case required Sherman Holland to seek "equitable" relief in the original complaint. (R. 2). Therefore, no right to a jury trial existed, nor was one requested, on June 26, 1981, when Sherman Holland filed the original complaint.

B. Due to the Information Gathered Through Discovery, Sherman

Holland Amended the Complaint to Include Legal Claims and Demanded a Jury Trial as to the New Legal Issues.

On January 8, 1982, six months after the commencement of this action, petitioner amended the original complaint to include the legal claims of fraud, deceit, fraudulent deceit and bad faith. (R. 28). Through pretrial discovery, Sherman Holland revealed information concerning the intentional and/or reckless conduct on the part of FMC. In order to protect the petitioner's constitutional rights as to these new "legal" claims, the amended complaint included a request for a jury trial. (R. 30). The jury demand was specifically requested for the new issues only. Fed. R. Civ. P. 38(c). (R. 30).

The amended complaint injected "legal" issues into the pending litigation. The right to a jury trial on a claim of fraud

depends upon the remedy sought and the context to which the claim arises. New Hampshire Fire Insurance Co. v. Perkins, 28 F.R.D. 588, 591 (D. Del. 1961). See also Federal Practice, supra at 52. When a party seeks to rescind or reform a contract and sues for damages because of the culpability of the defendant's conduct, a right to a jury trial exists. Buzard v. Houston, 119 U.S. 347 (1886). See also Logan v. Holman, 7 F.R.D. 596 (D.N.J. 1947). Especially when the defendant's conduct raises the issue of punitive damages, the right to a jury trial on such issue is required by the seventh amendment. Smyth Sales, Inc. v. Petroleum Heat & Power Co., 141 F.2d 41 (3d Cir. 1944). See also Curriden v. Middleton, 232 U.S. 663 (1914).

The amended complaint of January 8, 1982, added fraud claims, of varying culpability, to the previously "equitable" pro-

ceeding. All issues presented by the amended complaint were "legal" within the context of the seventh amendment and the Federal Rules of Civil Procedure. Therefore, a limited right to a jury trial was created on January 8, 1982.

C. Respondent's Improper Denial of the Jury Demand Unreasonably Deprived Petitioner of His Seventh Amendment Right to a Jury Trial.

Rule 38(b) provides that a jury may be demanded "[n]ot later than ten days after service of the last pleading directed to such issue". Fed. R. Civ. P. 38(b). Obviously, the drafters intended to take into account the possibility that new "legal" issues may be raised by amended or supplemental pleadings. A demand for a jury trial is proper if made within ten days after service of the amended pleading creating the new issues. Cannister Co. v.

Leahy, 191 F.2d 255 (3d Cir.), cert. denied 342 U.S. 893 (1951). See also Federal Practice, supra at 94 n 37. This right to a jury trial exists only to the new "legal" issues raised by the amended pleadings. First Wisconsin National Bank v. Klapmeier, 526 F.2d 77 (8th Cir. 1975) [hereinafter cited as Klapmeier]; Jackson v. Airways Parking Co., 297 F. Supp. 1366 (N.D. Ga. 1969).

Petitioner acknowledges and applauds decisions holding that an amendment does not revive a jury demand that has been previously waived if no "new issue" is created by the amendment. See, e.g., Ruff v. Hyer, 142 F.2d 227 (5th Cir.), cert. denied, 323 U.S. 712 (1944) (belated amendment touching same general issues); Williams v. Farmers & Merchants Insurance Co., 457 F.2d 37 (8th Cir. 1972) (no new issue raised) [hereinafter cited as Williams]. More recently, the Fifth Cir-

cuit has recognized the aforementioned rule in Guajardo v. Estelle, 580 F.2d 748 (5th Cir. 1978) [hereinafter cited as Guajardo]. In Guajardo, the plaintiff originally sought declaratory and injunctive relief, but amended the complaint to strike the injunctive relief to ensure a jury trial on the declaratory judgment action. More specifically, prison inmates challenged the constitutionality of the Texas Department of Corrections' rules and practices concerning inmate correspondence. The court held that the amendment did not create new issues because no "legal" issues were presented for the first time and the amended complaint "merely restated their earlier pleadings". Id. at 753.

The facts of Guajardo are clearly distinguishable from the case at bar because Sherman Holland's amended complaint added new issues of fact for determination. (R. 28). Some of the new issues of fact raised

by the amended complaint include: (1) Whether FMC intentionally misrepresented the facts to Sherman Holland; (2) Whether FMC acted with gross disregard for the truth; (3) To what extent was Sherman Holland injured by the misrepresentations; and (4) Whether punitive damages were appropriate. In Guajardo, however, the amendment raised no new issues of fact for determination. Moreover, the Court never recognized that the plaintiffs had a right to a jury trial as to the declaratory relief requested. Id. at 752. Therefore, the Hon. Seybourn H. Lynne erroneously applied the wrong rule of law to the facts of the instant case.

In order to waive a constitutional right, one must initially possess the right in question. United States v. Moore, 340 U.S. 616, 621 (1951). Once a party possesses a right to a jury trial, the failure to demand a jury trial constitutes a waiver of this right. Id. See also Fed. R. Civ.

P. 38(d). At the commencement of this action, however, due to the "equitable" nature of the claims asserted against FMC, no right to a jury trial existed. (R. 2). The right to a jury trial ripened on January 8, 1982, when Sherman Holland amended the complaint to inject new "legal" issues. (R. 28). Petitioners made their jury demand in the amended complaint within the ten day period as required by Rule 38(d) (simultaneous with the filing of said amendment). (R. 30).

The appropriate method to review an improper denial of the jury demand, is the petition for writ of mandamus. Dairy Queen, 369 U.S. at 480. See also Federal Practice, supra at 105 n 67. Sherman Holland submits that the Honorable Seybourn H. Lynne improperly denied their jury demand as to the new "legal" issues in light of the "equitable" nature of the original action. Goldman, Sachs & Co. v.

Edelstein, 494 F.2d 76 (2d Cir. 1974). For these reasons, petitioner respectfully requests this Court to reverse the order of the Eleventh Circuit and to issue a writ of mandamus requiring the Honorable Seybourn H. Lynne to grant Sherman Holland's request for a jury trial.

III. ASSUMING ARGUENDO THAT THE PETITIONER DID WAIVE THE RIGHT TO DEMAND A JURY TRIAL IN THE INITIAL COMPLAINT, THE SUBSEQUENT AMENDMENT CREATED NEW LEGAL ISSUES REVIVING THE RIGHT TO A JURY TRIAL FOR THESE NEW CLAIMS.

A. Once Waived, a Right to a Jury Trial May Be Revived By an Amendment of the Pleadings if New Legal Issues are Presented by Such Amendment.

Even if this Court finds that Sherman Holland possessed and waived his right to a jury trial upon the initiation of this action, the right to a jury trial may be revived by amendment to the pleadings. Allied Industrial Workers v. General

Electric Co., 471 F.2d 751 (6th Cir.), cert. denied, 414 U.S. 822 (1973); Williams, 457 F.2d at 37. See also Federal Practice, supra at 94 n. 37. This revival of the right to a jury trial is dependent upon the creation of "new legal issues" by the amendment. Klapmeier, 526 F.2d at 77. The amendment, which raises a "legal" issue for the first time, triggers the ten day period to demand a jury trial. In re Zweibon, 565 F.2d 742, 747-48 (D.C. Cir. 1977) [hereinafter cited as Zweibon]; Waldo Theatre Corp. v. Dondis, 1 F.R.D. 685 (D. Me. 1941) [hereinafter cited as Waldo Theatre].

Generally, four types of cases have arisen addressing this revivability issue. First, if the amended pleading substantially repeats, or is identical to, the original pleading, the amendment will not revive the right to a jury trial. Guajardo, 580 F.2d at 748; Trixler

Brokerage Co. v. Ralston Purina Co., 505 F.2d 1045 (9th Cir. 1974). Second, amended pleadings which involve the same theory of recovery, but set forth other supportive or explanatory information, do not revive the right to a jury trial once it has been waived. Moore v. United States, 196 F.2d 906 (5th Cir. 1952). Third, amended pleadings which merely alter the composition or description of the parties do not revive the right to a jury trial once it has been previously waived. American Fidelity & Casualty Co. v. All American Bus Lines, Inc., 190 F.2d 234 (10th Cir.), cert. denied, 342 U.S. 851 (1951). Fourth, amended pleadings which alter the cause of action or theory of recovery will revive the parties' right to demand a jury trial. Williams, 457 F.2d at 37; Mintz v. Allen, 45 F.R.D. 35 (S.D.N.Y. 1968); Cataldo v. E. I. DePont DeNemours & Co., 39 F.R.D. 305, order amended, 253 F. Supp. 235 (S.D.N.Y.

1966); Munkacsy v. Warner Brothers Pictures, Inc., 2 F.R.D. 339 (S.D.N.Y. 1942); Melay v. Fidelity National Bank, 2 F.R.D. 339 (S.D.N.Y. 1942); Waldo Theatre, 1 F.R.D. at 685. Therefore, only those amendments which alter the cause of action or theory of recovery create "new issues" so as to revive the right to a jury trial. Id.

B. The Introduction by Amendment of Tortious Claims for Relief Revived Petitioners' Right to a Jury Trial as to These New Issues.

Sherman Holland amended his complaint on January 8, 1982, to include claims for fraud, deceit, fraudulent deceit and bad faith. (R. 28). Under the original complaint, the issue was whether the misrepresentation and/or mistake induced Sherman Holland to execute the note and mortgage in question. Under the amended complaint, however, some of the following issues

were created. Whether the conduct of FMC was intentional? Whether the representations made by FMC to Sherman Holland were made with reckless disregard for the truth? To what extent was Sherman Holland damaged by such fraudulent representations? Whether FMC's conduct was so gross and/or oppressive so as to support an award of punitive damages? The aforementioned issues, as well as others, have been created by the amendment of petitioner's complaint. (R. 28).

Sherman Holland contends that the District Judge's denial of the jury demand was improper because the amended complaint introduced "new legal issues" which revived the right to a jury trial. Lanza v. Drexel & Co., 479 F.2d 1277 (2d Cir. 1973). Petitioner's request for a jury trial on these "new legal issues" was within the ten day period and therefore should have been granted. Zweibon, 565 F.2d at 742. The

appropriate method to review an erroneous denial of a jury demand is the petition for writ of mandamus. Dairy Queen, 369 U.S. at 480. Sherman Holland respectfully requests this Court to issue a writ of mandamus reversing the order of the Eleventh Circuit and requiring the Honorable Seybourn H. Lynne to grant a jury trial as to these new legal issues.

IV. THE DISTRICT JUDGE ABUSED HIS DISCRETION IN DENYING THE PETITIONER'S REQUEST FOR A JURY TRIAL BECAUSE OF THE FUNDAMENTAL IMPORTANCE OF THE SEVENTH AMENDMENT.

Rule 39(b) provides that the court has the discretion upon motion of any party to order a trial by jury even if the party has waived his right under Rule 38(d). Fed. R. Civ. P. 39(b). The obvious purpose of Rule 39(b) is to achieve substantial justice and to relax the time requirements of Rule 38. Miskell v. Southern Feed Co., 439 F.2d 790 (5th Cir. 1971). See also Federal Practice supra at 111 n. 26. In order to perfect

the movant's rights under Rule 39(b), the party must move the court to order a jury trial. Mesa Petroleum Co. v. Coniglio, 629 F.2d 1022 (5th Cir. 1980). An untimely demand for a jury trial will have the same effect as a motion for Rule 39(b) purposes. Swofford v. B & W, Inc., 336 F.2d 406 (5th Cir.), cert. denied, 379 U.S. 962 (1964) [hereinafter cited as Swofford]. Assuming arguendo that this Court holds that the petitioner waived his right to a jury trial, the amended complaint included a demand for a jury trial on January 8, 1982. (R. 30). This demand for a jury trial was the substantial equivalent of a motion under Rule 39(b).

The majority of the circuits that have addressed this issue have held that a district judge should liberally grant a jury trial that has been previously waived unless strong and compelling reasons to the contrary exist. See, e.g., Cox v. C. H.

Masslin & Sons, 607 F.2d 138 (5th Cir. 1979) [hereinafter cited as Cox]; Swofford, 336 F.2d at 406; United States v. Pfizer, Inc., 560 F.2d 319 (8th Cir. 1977); AMF Tuboscope, Inc. v. Cunningham, 352 F.2d 150 (10th Cir. 1965) [hereinafter cited as AMF]. The factors which the court should analyze in determining whether to exercise its discretion should be: (1) the possible delay or inconvenience to the court; (2) the possible prejudice or surprise to the parties; (3) the stage of the pending litigation. Cox, 607 F.2d at 138. In the instant case, the jury demand was requested during pretrial discovery and presented neither prejudice to the parties nor inconvenience to the court. (R. 28). Therefore, no compelling reasons existed to support the district judge's denial of the jury demand.

Due to the fundamental importance of a jury trial and the lack of a strong and

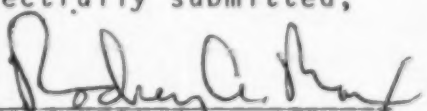
compelling reason to support the denial, the district judge abused his discretion in striking the petitioner's jury demand. Therefore, Sherman Holland respectfully requests this Court to reverse the order of the Eleventh Circuit and to issue a writ of mandamus requiring the Honorable Seybourn H. Lynne to grant a jury trial for the new "legal" issues presented.

CONCLUSION

This Court should issue a writ of mandamus due to Sherman Holland's inability to protect their seventh amendment rights. Petitioner's amendment to the pleadings injected "legal" issues into a previously equitable action so as to mature its right to a jury trial. Assuming arguendo that Sherman Holland waived their right, the subsequent amendment revived the right to a jury trial on the new "legal" issues raised by the amendment. Notwithstanding the waiver of the right to a jury trial, a

district judge should liberally grant a jury demand absent strong and compelling reasons to the contrary. Since relief cannot be provided in any other court or form, Sherman Holland respectfully requests this Court to reverse the order of the United States Court of Appeals for the Eleventh Circuit, and to issue a writ of mandamus requiring the Honorable Seybourn H. Lynne to protect petitioner's seventh amendment right to a jury trial. Due to the complexity of the issues presented in this petition and the fundamental nature of the seventh amendment, Sherman Holland respectfully requests oral argument.

Respectfully submitted,

BY: 

Rodney A. Max
Denaburg, Schoel, Meyerson,
Ogle, Zarzaur & Max
2125 Morris Avenue
Birmingham, Al. 35203
(205) 328-5760

Attorney for Petitioners

PROOF OF MAILING

I, Rodney A. Max, attorney for Harrison Sherman Holland, Jr., Carolyn M. Holland and Sherman Holland Ford, Inc., Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st day of May, 1982, I deposited in a United States post office located in Birmingham, Alabama, with first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, the foregoing Petition for Writ of Mandamus.

RODNEY A. MAX
Counsel for Petitioners

SWORN TO and subscribed before me, this 21 day of May, 1982.

Donna Lynn Glass
NOTARY PUBLIC

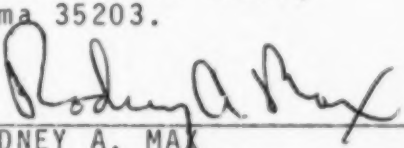
MY COMMISSION EXPIRES DEC. 8, 1982

CERTIFICATE OF SERVICE

I, Rodney A. Max, attorney for Harrison Sherman Holland, Jr., Carolyn M. Holland and Sherman Holland Ford, Inc., Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st day of May, 1982, I served copies of the foregoing Petition for Writ of Mandamus on the several parties thereto, as follows:

1. On the Honorable Seybourne H. Lynne, Respondent, by mailing copies in duly addressed envelopes, with first class postage prepaid, to him at Federal Courthouse, Birmingham, Alabama 35203;

2. On Ford Motor Credit Corporation, Defendant, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorney of record, Hobart A. McWhorter, Jr., Esquire, at 1400 Park Place Tower, Birmingham, Alabama 35203.



RODNEY A. MAX
Counsel for Petitioners

Appendix

1

Office - Supreme Court, U.S.
FILED
JUN 7 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-2156

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1982

In re Harrison Sherman Holland, Jr., Carolyn M. Holland, and Sherman Holland Ford, Inc.,

Petitioners,

vs.

Honorable Seybourn H. Lynne, Judge of the United States District Court for the Northern District of Alabama, Southern Division,

Respondent.

APPENDIX TO

ON PETITION FOR WRIT OF MANDAMUS

TO THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Rodney A. Max
Denaburg, Schoel, Meyerson,
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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 82-7096

IN RE: HARRISON SHERMAN HOLLAND, JR., et al,

Petitioners.

ON PETITION FOR WRIT OF MANDAMUS

TO THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ALABAMA

Before TJOFLAT, FAY and HENDERSON, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the Petition for Writ of Mandamus is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

HARRISON SHERMAN HOLLAND, JR., CAROLYN M. HOLLAND, and SHERMAN HOLLAND FORD, INC.,	)	
Plaintiffs,	)	CIVIL ACTION CV81-L-1009-S
VS.	)	
FORD MOTOR CREDIT COMPANY, et al.,	)	
Defendants.	)	

O R D E R

This cause, coming on to be heard at a motion docket on February 5, 1982, was presented to the Court on defendant's motion to dismiss the complaint as amended and to strike the plaintiffs' jury demand with respect to Counts Three, Four and Five of the amended complaint. After considering the pleadings and the memoranda addressed to the jury issue submitted by counsel, the Court is of the opinion that the motion to dismiss should be granted

with respect to Count Six of the amended complaint and that the jury demand should be stricken.

In Count Six, plaintiffs seek to recover in tort for the breach of "an implied duty of good faith and fair dealing," a theory of recovery better known as the "tort of bad faith." This theory of recovery, however, is applicable only in the insurance contract context. Brown Marx Associates, Ltd. v. Emigrant Savings Bank, No. CV 79-PT-1423-S (N.D. Ala., memorandum opinion entered Dec. 4, 1981)(Propst, J.). Since this action does not involve an insurance contract, Count Six must be dismissed.

The demand for a jury trial indorsed on the amended complaint must be stricken as untimely. The issues presented in the additional claims based on fraud and deceit were raised in the original complaint and the time for demanding a jury has passed.

C. Wright & A. Miller, Federal Practice and Procedure §2320 (1971); see also Moore v. United States, 196 F.2d 906 (1952). Plaintiffs' argument that they are at least entitled to a jury trial on the issue of damages fails for the same reason.

Finally, the Court declines, in the exercise of its discretion, to accept plaintiffs' suggestion that a jury be empaneled under Fed. R. Civ. P. 39(b). This request for a jury is not a case of excusable inadvertence but appears to be only a belated change of strategy.

It is accordingly, ORDERED, ADJUDGED and DECREED by the Court that Count Six of the amended complaint be and the same is hereby dismissed and that the demand for tiral by jury be and the same is hereby stricken. Defendant's motion to dismiss is denied in all other respects.

The principle is well settled that "[a]mendments not introducing new issues will not give rise to a demand for a jury trial." Guajardo v. Estelle, 580 F.2d 748, 753 (5th Cir. 1978). The amended complaint in this case presents only a different theory of recovery and form of relief.

Plaintiffs' argument that the original complaint presented only equitable issues as to which no jury could have been demanded and thus that there could be no waiver of jury trial is attractive but unsound. As a leading authority has noted,

> "[d]espite the seeming logic of this position, the better analysis is to the contrary. The party is claiming all along that one set of circumstances entitles him to help from the court. If these circumstances give rise to any issue on which the Constitution guarantees jury trial, the party should have demanded a jury trial at the outset and should not be able to regain the right previously waived."

DONE this 3rd day of March, 1982.

/s/ Seybourn H. Lynne
SENIOR JUDGE

PROOF OF MAILING

I, Rodney A. Max, attorney for Harrison Sherman Holland, Jr., Carolyn M. Holland and Sherman Holland Ford, Inc., Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 3 day of June, 1982, I deposited in a United States post office located in Birmingham, Alabama, with first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, the foregoing Appendix to the Petition for Writ of Mandamus.

Rodney A. Max

RODNEY A. MAX
Counsel for Petitioners

SWORN TO and subscribed before me, this 3 day of June, 1982.

Donna Lynn Max

NOTARY PUBLIC

MY COMMISSION EXPIRES DEC. 8, 1982

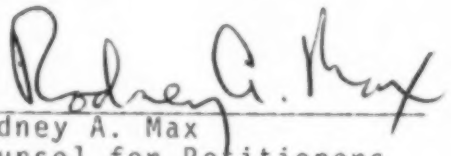
CERTIFICATE OF SERVICE

I, Rodney A. Max, attorney for Harrison Sherman Holland, Jr., Carolyn M. Holland and Sherman Holland Ford, Inc., Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 3 day of June, 1982, I served copies of the foregoing Appendix to Petition for Writ of Mandamus on the several parties thereto, as follows:

1. On the Honorable Seybourne H. Lynne, Respondent, by mailing copies in duly addressed envelopes, with first class postage prepaid, to him at Federal Courthouse, Birmingham, Alabama 35203;

2. On Ford Motor Credit Corporation, Defendant, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorney of record, Hobart A. McWhorter, Jr., Esquire, at 1400 Park Place Tower, Birmingham, Alabama 35203.

3. On the Solicitor General of the United States by mailing a copy in a duly addressed envelope, first class postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530.



Rodney A. Max
Counsel for Petitioners
2125 Morris Avenue
Birmingham, Al. 35203
(205) 328-5760

Appendix

2

MAY 24 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-2156

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1982

In re Harrison Sherman Holland, Jr., Carolyn M. Holland, and Sherman Holland Ford, Inc.,

Petitioners,

vs.

Honorable Seybourn H. Lynne, Judge of the United States District Court for the Northern District of Alabama, Southern Division,

Respondent.

RECORD IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Rodney A. Max
Denaburg, Schoel, Meyerson, Ogle
Zarzaur & Max
2125 Morris Avenue
Birmingham, Al. 35203
(205) 328-5760

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CIRCUIT COURT

FOR SHELBY COUNTY, ALABAMA

HARRISON SHERMAN HOLLAND, JR., CAROLYN M. HOLLAND, and SHERMAN HOLLAND FORD, INC.

Plaintiff

vs.

FORD MOTOR CREDIT COMPANY, a corporation; and X, Y, & Z, being those persons, firms or corporations having an interest in the note and mortgage hereinafter referred to, which X, Y, & Z, persons, firms, etc.

Defendant

CIVIL ACTION NO. CV-81-155

(EQUITY)

SUMMONS

To Any Sheriff or any person authorized by Rule 4 (a) (3) of the Alabama Rules of Civil Procedure to effect service in the State of Alabama

You are hereby commanded to serve this summons and a copy of the complaint in this action upon defendant FORD MOTOR CREDIT COMPANY

Each defendant is required to serve a copy of a written answer to the complaint upon Charles L. Denaburg, attorney of record for the plaintiff whose address is 2125 Morris Avenue, Birmingham, AL 35203 within thirty (30) days after service of this summons excluding the day of service of the summons and to file the original of said written answer with the Clerk of this Court at the time of service of the answer upon the attorney of record for the Plaintiff or within a reasonable time thereafter. If any defendant fails to do so, a judgment by default may be entered against that defendant for the relief complained of in the complaint.

Dated January 26, 1981

Clerk of the Circuit Court
Shelby County Courthouse
P. O. Box 1627
Columbiana, AL 35051

(FOR SHERIFF'S RETURN ONLY)

Serve on:

Name FORD MOTOR CREDIT COMPANY

Address 11 West Oxmoor Road

City Homewood, AL 35209

10274-CLD

IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA
EQUITY DIVISION

HARRISON SHERMAN HOLLAND, JR., CAROLYN M. HOLLAND, and SHERMAN HOLLAND FORD, INC.,)

PLAINTIFFS,)

VS.)

FORD MOTOR CREDIT COMPANY, a corporation; and X, Y, & Z, being those persons, firms or corporations having an interest in the note and mortgage hereinafter referred to, which X, Y, & Z, persons, firms or corporations, are heretofore unknown but will be substituted by amendment when ascertained,)

DEFENDANT.)

CIVIL ACTION NO. CV-81-155

FILED IN OFFICE THIS THE 26th DAY
OF June, 1981
Kyle Langford
Clerk of Circuit Court
Shelby County, Alabama

COMPLAINT FOR DECLARATORY RELIEF AND REFORMATION

COUNT I - DECLARATORY RELIEF

1. (a) Plaintiffs, Harrison Sherman Holland, Jr. and Carolyn M. Holland, are over the age of nineteen (19) years and are resident citizens of Shelby County, Alabama.

(b) Plaintiff, Sherman Holland Ford, Inc., is a corporation duly organized and authorized to do business in the State of Alabama with its principal place of business in Alabaster, Shelby County, Alabama, and conducts and operates its business on the property made the subject of this litigation.

2. (a) Ford Motor Credit Company is a Delaware corporation qualified to do business within the State of Alabama and doing business in Shelby County, Alabama during all times made occurrences of the allegations and averments set forth hereinbelow.

(b) X, Y, & Z are those persons, firms or corporations having an interest in the note and mortgage hereinafter described, or may be liable for acts committed to the injury of the Plaintiffs, but are at this time unknown and shall be substituted by amendment when ascertained.

3. On or about the 29th day of June, 1976, Plaintiffs and Defendant entered into a Promissory Note and Mortgage, attached hereto as Exhibits "A" and "B" and incorporated herein as if fully set forth.

4. Under the expressed terms of said Promissory Note, Plaintiffs are obligated to pay the sum of $470,000.00 together with interest on the

unpaid balance at a rate of nine and one-quarter (9 1/4%) percent per annum, payment to be made as follows , to-wit:

"(a) in 59 successive monthly installments of Four Thousand Six Hundred Fourteen and no/100 Dollars ($4,614.00) each, commencing one month after the date hereof (June 29, 1976) and continuing on the like day of each month thereafter for a period of 59 successive months....

"(b) On the fifth (5th) anniversary of the date hereof (June 29, 1976), a final installment consisting of the remaining balance of the principal sum together with all accrued interest thereon and all other sums due hereunder."

5. Both in the negotiation of the note and in the explanation of the closing documents, Defendant and/or its agents represented to Plaintiffs that despite the above-stated language contained in the note, that payment of the $470,000.00 at a rate of 9 1/4% interest with payments of $4,614.00 would be not for a five-year term, but rather for a twenty-year term.

6. Plaintiffs expressly and emphatically stated to Ford Motor Credit, by and through its authorized agents, that despite the terms of the note, that they were agreeing to pay the sum of $470,000.00 together with interest at 9 1/4% interest per annum in equal monthly payments amortized over a full twenty-year term.

7. Plaintiffs specifically inquired about the language relative to the five-year term and the "balloon payment" on the fifth anniversary and Defendant, by and through its authorized agents, assured Plaintiffs that the twenty-year commitment had been approved as the Plaintiffs had requested and that the loan would merely be renewed each five-year period at the same interest rate amortized over the full twenty-year term.

8. Defendant, by and through its authorized agent, explained that the five-year term and balloon payment thereon was a custom and practice of the Defendant for financial investment purposes.

9. The twenty-year 9 1/4% payout was specifically negotiated and agreed to and approved by Defendant, by and through its authorized agents, and confirmed by the Defendant's closing representatives prior to the execution of the note and mortgage attached hereto as Exhibits "A" and "B".

10. Based upon the representations made by the Defendant, its servants, agents, employees and other parties having an interest therein, the Plaintiff, Sherman Holland Ford, Inc., was induced to re-locate its business from its existing facilities in Montevallo, Alabama, and enter into a lease with the Plaintiffs, Harrison Sherman Holland, Jr. and Carolyn M. Holland, on the premises made the subject of this litigation.

11. In recent communication with Defendant, by and through its agents, Plaintiffs have been informed that Defendant is demanding the balloon payment on June 29, 1981, or alternatively that Plaintiffs re-negotiate the financing of the balance due at the current interest rate (see letter dated May 28, 1981, attached hereto as Exhibit "C").

12. Plaintiffs aver that the request of Defendant is contrary to the terms and conditions negotiated by Defendant and contrary to the explanation which was given to them as to the payment of the note, both in negotiation and prior to the time of closing by Defendant's authorized agents and closing representatives.

13. Plaintiffs aver that performance of the terms of the note as written and as recently requested is impossible and will cause irreparable financial damage and injury to the Plaintiffs, and will further cause irreparable harm to the Plaintiffs and will be fatal to that corporation which they own known as Sherman Holland Ford, Inc. Further, it will cause other incidental and consequential and irreparable damage to the reputation and good will which the Plaintiffs have built up over the years in the State of Alabama and particularly the Shelby County and Jefferson County areas.

14. Plaintiffs aver that they have promptly made all payments required to be made under the said note on or before the day they became due, and will continue to make said payments as previously agreed and scheduled to either the Defendant, Ford Motor Credit, and/or the Clerk of the Circuit Court of Shelby County, Alabama, pending disposition of this matter.

15. Plaintiffs aver that this Honorable Court has jurisdiction over this cause to declare the rights and status under the note and mortgage set forth hereinabove pursuant to Alabama Code of 1975, Section 6-6-221, et seq.

(a) Pursuant to Alabama Code of 1975, Section 6-6-221, Plaintiffs aver that they are entitled to relief from the uncertainty and

insecurity with respect to their rights and status under the note and mortgage set forth hereinabove.

(b) Pursuant to Alabama Code of 1975, Section 6-6-223, that the rights and status of the Plaintiffs under the note and mortgage as set forth hereinabove, as negotiated and interpreted by Plaintiffs and Defendant prior to closing are entitled to be determined by this Court.

(c) Pursuant to Alabama Code of 1975, Section 6-6-224, this cause is due to be heard even before a breach has occurred. Plaintiffs conscientiously and judiciously seek this relief in order to prevent the substantial and irreparable damage to Plaintiffs which will occur if the demands recently made by Defendant are allowed to prevail.

(d) Plaintiffs aver that the Court's declaration of the rights of Plaintiffs and Defendant shall terminate the uncertainty and controversy giving rise to this proceeding (cf. Alabama Code of 1975, Section 6-6-229).

WHEREFORE, the above premises considered, Plaintiffs pray that this Honorable Court will take jurisdiction of this cause and upon final hearing declare the just and equitable rights and status of the Plaintiffs and the Defendant in and to the note and mortgage set forth hereinabove and that as part of said just and equitable relief this Court declare that the Plaintiffs shall pay the principal balance due under the note and mortgage in equal monthly installments at 9 1/4% interest per annum amortized over a twenty-year term, as said term relates back to June 29, 1976. Plaintiffs further pray that the Court will order such further relief as the Court deems just and proper. Plaintiffs further pray that the Court shall award to them the cost of this cause as is equitable and just pursuant to Alabama Code of 1975, Section 6-6-231.

COUNT II - REFORMATION

1. Plaintiffs incorporate each and every allegation and averment set forth in Count I in support of Count II.

2. Plaintiffs aver that the language contained in the note attached hereto as Exhibit "A" was obtained through misrepresentation of material fact as to the interpretation of the language contained in the note, or was obtained through mutual mistake of the parties in using and interpreting

the language set forth in the note, or was obtained by mistake of the Plaintiffs which the Defendant at the time of the execution of the note knew or suspected.

3. Plaintiffs aver that through said misrepresentation of material fact, mutual mistake, or unilateral mistake, of which Defendant was aware, the note does not truly express the intention of the parties.

4. Plaintiffs aver that their true intention which was expressed to the Defendant, by and through its agents, and confirmed by the Defendant, by and through its agents, was that the note would be paid over a twenty-year term at 9 1/4% interest per annum, without payment of any balloon and without any increase in the rate of interest.

5. Plaintiffs aver that there are no third parties whose rights would otherwise be prejudiced by reformation or revision of the note and mortgage as prayed for by Plaintiffs.

WHEREFORE, the above premises considered, Plaintiffs pray that this Honorable Court will take jurisdiction of this cause pursuant to Alabama Code of 1975, Section 35-4-153, and upon final hearing will reform and revise the note and mortgage consistent with the intentions of the parties as was negotiated and represented to the Plaintiffs prior to execution thereof and more specifically, to revise and reform the note and mortgage to require payment of the unpaid balance at an interest rate of 9 1/4% per annum amortized and payable over a full twenty-year term relating back to June 29, 1976. Plaintiffs pray for such further relief as this Court deems just and proper. Plaintiffs further pray that this Court will assess cost of this cause against Defendant.

DENABURG, [illegible]CHOEL, MEYERSON, OGLE, ZARZAUR &

By _____
CHARLES L. DENABURG and RODNEY A. MAX
Attorneys for Plaintiffs
2125 Morris Avenue
Birmingham, AL 35203
(205) 328-5760

PLAINTIFFS' ADDRESS:
U.S. Highway 31
Under the Flag
Alabaster, AL 35007

DEFENDANT'S ADDRESS:
11 West Oxmoor Road
Homewood, AL 35209

PROMISSORY NOTE

$470,000.00 Date June 29, 1976

FOR VALUE RECEIVED, the undersigned, HARRISON SHERMAN HOLLAND, JR., AND CAROLYN M. HOLLAND, his wife, (hereinafter referred to as "Borrowers") residing at 411 Crestview Drive, Montevallo, Alabama, jointly and severally, promise to pay to FORD MOTOR CREDIT COMPANY, a Delware corporation (hereinafter referred to as "Holder"), or order, at 11 West Oxmoor Road, Homewood, Alabama, or such other place as Holder may hereafter nominate, the principal sum of FOUR HUNDRED SEVENTY THOUSAND and NO/100 DOLLARS ($470,000.00) together with interest (computed on the basis of the actual number of days elapsed over a year of 360 days) on the unpaid balance thereof outstanding from time to time at the rate of nine and one-quarter percent (9.25%) per annum. Payment shall be made as follows:

(a) in 59 successive monthly instalments of Fourd Thousand Six Hundred Fourteen and No/100 Dollars ($4,614.00) each, commencing one month after the date hereof and continuing on the like day of each month thereafter for a period of 59 successive months. Each such instalment will be applied first to the payment of interest due to the date of such payment, and the balance remaining after the payment of such interest shall be applied in reduction of the principal sum hereunder, and;

(b) On the fifth (5th) anniversay of the date hereof, a final instalment consisting of the remaining balance of the principal sum together with all accrued interest thereon and all other sums due hereunder.

All payments of principal, interest, and all other sums due hereunder shall be in lawful money of the United States of America. In addition, Borrowers

agree to pay reasonable attorneys' fees (15% of the then unpaid principal sum, if permitted by law) if this instrument is placed with an attorney for collection.

The term "Mortgage" shall mean the mortgage of even date with this Promissory Note, from Borrowers, as Mortgagors, to and for the benefit of Holder, as mortgagee, covering certain real property described therein situate in the City of Alabaster, Shelby County, Alabama.

The term "Other Security Documents" shall mean all and any of the documents other than this Promissory Note and the Mortgage, now or hereafter executed by Borrowers and/or others, all by or in favor of Holder, which wholly or partially secure this Promissory Note.

This Promissory Note is secured by the Mortgage and the Other Security Documents. All of the agreements, conditions, covenants, provisions and stipulations contained in the Mortgage and Other Security Documents which are to be kept and performed by Borrowers and/or others are hereby made a part of this Promissory Note to the same extent and with the same force and effect as if they were fully set forth herein, and Borrowers covenant and agree to keep and perform them, or cause them to be kept and performed, strictly in accordance with their terms.

Borrowers may prepay the unpaid principal balance outstanding under this Promissory Note (hereinafter called the "Principal Balance") in whole, or from time to time in part, upon payment of interest accrued on the Principal Balance through the day of prepayment and payment of a prepayment premium in an amount equal to the amount of the Principal Balance then being prepaid multiplied by:

(a) 2.0%, if such prepayment is made on or before the second anniversary of the date hereof; or

(b) 1.5%, if such prepayment is made after the second anniversary of the date hereof, but on or before the third anniversary of the date hereof; or

(c) 1.0%, if such prepayment is made after the third anniversary of the date hereof, but on or before the fourth anniversary of the date hereof; or

(d) 0.5%, if such prepayment is made after the fourth anniversary of the date hereof, but before the fifth anniversary of the date hereof.

However, prepayment of the Principal Balance in an aggregate amount of $94,000.00 may be made without a prepayment premium. There shall be no prepayment premium due on or after the fifth anniversary of the date hereof. Prepayments of the Principal Balance shall be applied to the instalments of the Principal Balance remaining unpaid in the inverse order of their maturity.

Borrowers expressly agree that the Principal Balance together with accrued interest thereon may be declared to be immediately due and payable by Holder, without notice or demand, upon the happening of any event of default under the Mortgage or the Other Security Documents.

Holder shall have the option, exercisable at any time without notice or demand, to declare all or any part of the Principal Balance together with accrued interest thereon to be immediately due and payable upon the occurrence of any one or more of the following events of default:

(a) Non-payment by Borrowers of all or any portion of any payment of principal or interest when due or

(b) If either or both of Borrowers shall (1) be adjudicated a bankrupt or insolvent (2) seek or consent to the appointment

of a receiver or trustee for Borrowers or either of them, or for all or any part of his or her property (3) file a petition seeking relief under the bankruptcy or similar laws of the United States or any state or any other competent jurisdiction (4) make a general assignment for the benefit of creditors or (5) admit in writing of his or her inability to pay his or her debts as they mature; or

(c) If a court of competent jurisdiction shall enter an order, judgment, or decree appointing without the consent of Borrowers, or either of them, a trustee or received for him or her or for all or any part of his or her property or approving a petition filed against Borrowers, or either of them, seeking relief for him or her under the bankruptcy or other similar laws of the United States or any state or other competent jurisdiction.

Time is of the essence hereof and if any payment of principal or of interest on this Promissory Note or other sum due hereunder is not paid when due, either by acceleration or otherwise, the amount thereof shall thereafter bear interest at the rate of fifteen percent (15.00%) per annum until paid (provided that interest shall in no event exceed an amount equal to simple interest on the Principal Balance or other sum due hereunder at the maximum rate permitted by law).

The remedies of Holder, as provided herein and in the Mortgage and in the Other Security Documents, shall be cumulative and concurrent and may be pursued singly, successively or together, at the sole discretion of Holder, and may be exercised as often as occasion therefor shall occur and the failure to exercise any

such right or remedy shall in no event be construed as a waiver or release thereof.

Borrowers waive presentment for payment, demand, notice of demand, notice of nonpayment or dishonor, protest and notice of protest of this Promissory Note, and all other notices in connection with the delivery, acceptance, performance, default or enforcement of the payment of this Promissory Note, except as otherwise specifically provided herein.

Seller shall not be deemed, by any act of omission or commission, to have waived any of its rights or remedies hereunder unless such waiver is in writing and signed by Seller and, then, only to the extent specifically set forth in the writing. A waiver with reference to one event shall not be construed as continuing or as a bar to or waiver of any right or remedy as to a subsequent event.

This instrument shall be governed by and construed according to the laws of the State of Alabama. This Note shall bind the successors and heirs of their respective heirs and assigns and the benefits hereof shall inure to Seller and its successors and assigns.

IN WITNESS WHEREOF, Borrowers have executed this instrument the date and year first above written.

John Burdette Bates
Witness

Harrison Sherman Holland, Jr.

Witness

Carolyn T. Holland

COPY

MORTGAGE

This Mortgage is made the 29th day of June, 19 75, between Harrison Chorman Holland, Jr., and Carolyn T. Holland, his wife, whose address is set forth below, as Mortgagor, and Ford Motor Credit Company, a Delaware corporation having a place of business at the address set forth below, as Mortgagee.

Article 1

DEFINITIONS

1.1 Definitions

As used herein, the following terms shall have the following meanings:

(a) Defaulted Interest Rate: The interest rate of 1.50 % per annum.

(b) Note: The promissory note, dated of even date with this Mortgage, made by Mortgagor to the order of Mortgagee, in the amount of $ 475,000.00, secured, in part, by this Mortgage.

(c) Mortgagee's Address: 11 Oak Harbor Road, Hollywood, Alabama

(d) Mortgagor's Address: 811 Creekview Drive, Montevallo, Alabama.

(e) Assignment: The assignment, contained in Article 2 of this Mortgage, from Mortgagor to Mortgagee, of all of Mortgagor's right, title and interest in and to the Leases and the Rents.

(f) Awards: All awards and payments made or hereafter to be made by any municipal, state or Federal authorities or Boards to Mortgagor, including any awards and payments for any taking of all or a portion of the Mortgaged Property, as a result of, or by agreement in anticipation of, the exercise of the right of condemnation or eminent domain, or for any change or changes of grade of streets affecting the Mortgaged Property.

(g) Buildings: All buildings, improvements, alterations or appurtenances now or at any time hereafter, located upon the Land or any part thereof.

(h) Event(s) of Default: The happenings and occurrences described in Article 4 of this Mortgage.

(i) Fixtures: All fixtures located upon or within the Buildings or now or hereafter attached to, or installed in or used in connection with, any of the Buildings whether or not permanently affixed to the real estate.

(j) Impositions: All (i) real estate and personal property taxes and other land taxes and assessments, water and sewer rates and charges, and all other governmental charges and any interest or costs or penalties with respect thereto and charges for any easement or agreement maintained for the benefit of the Mortgaged Property which at any time prior to or after the execution of the Security Documents may be assessed, levied, or imposed upon the Mortgaged Property or the rent or income received therefrom or any use or occupancy thereof, and (ii) other taxes, assessments, fees and governmental charges levied, imposed or assessed upon or against Mortgagor or any of its properties.

(k) Indebtedness: The principal of and interest on and all other amounts, payments and premiums due under the Note and all other indebtedness of Mortgagor to Mortgagee under and/or secured by the Security Documents.

(l) Land: The real estate described in Schedule A attached hereto.

(m) Leases: Any and all leases, subleases, licenses, concessions or grants of other possessory interests now or hereafter in force, oral or written, covering or affecting the Mortgaged Property, or any part thereof, together with all rights, powers, privileges, options and other benefits of Mortgagor thereunder.

(n) Mortgaged Property: The Land and the Buildings and the Fixtures and the Personalty together with:

(i) all rights, privileges, tenements, hereditaments, rights of way, easements, appendages and appurtenances of the Land and/or the Buildings belonging or in anywise appertaining thereto and all right, title and interest of Mortgagor in and to any streets, ways, alleys, strips or gores of land adjoining the Land or any part thereof; and

(ii) all the estate, right, title, interest, claim or demand whatsoever of Mortgagor, either at law or in equity, in and to the Land and the Buildings and the Fixtures and the Personalty.

(o) Mortgagee: Ford Motor Credit Company, a Delaware corporation, and its successors and assigns and the holders, from time to time, of the Note.

(p) Mortgagor: The person, persons or entity named as such in the preamble of this Mortgage and, as the case may be, his, their or its heirs, administrators, executors, successors and assigns and his, their or its successors in interest in and to the Mortgaged Property.

(q) Obligations: Any and all of the covenants, promises and other obligations (other than the Indebtedness) made or owing by Mortgagor or others to or due to Mortgagee under and/or as set forth in the Note and/or the Security Documents.

(r) Permitted Encumbrances: The Leases and the encumbrances described, with particularity, in Schedule B attached hereto.

(s) Personalty: All furniture, furnishings, equipment, machinery and all other personal property (other than the Fixtures) now or hereafter located in, upon or about the Land and the Buildings, together with all accessions, replacements and substitutions thereto or therefor and the proceeds thereof.

(t) Rents: All of the rents, revenues, income, profits, deposits, tenders and other benefits payable under the Leases and/or arising from the use and enjoyment of all or any portion of the Mortgaged Property.

(u) Security Agreement: The Security Agreement, contained in this Mortgage, wherein and whereby Mortgagor grants a security interest in the Personalty and the Fixtures to Mortgagee.

(v) Security Documents: This Mortgage, the Assignment, the Security Agreement and any and all other documents now or hereafter securing the payment of the Indebtedness or the observance or performance of the Obligations.

Article 2

GRANT

2.1 Grant. To secure the payment of the Indebtedness and the performance and discharge of the Obligations, Mortgagor by these presents hereby grants, bargains, sells, assigns, mortgages, conveys and warrants unto Mortgagee the Mortgaged Property, the Leases, the Rents and the Awards, subject, however, to the Permitted Encumbrances, to have and to hold the Mortgaged Property unto Mortgagee, its successors and assigns forever.

2.2 Condition of Grant. The condition of these presents is such that if Mortgagor shall pay or cause to be paid the Indebtedness as and when the same shall become due and payable and shall observe, perform and discharge the Obligations, then the Security Documents and the estates and rights granted by them shall be void, otherwise to remain in full force and effect.

Article 3

COVENANTS

Until the entire Indebtedness shall have been paid in full, Mortgagor hereby covenants and agrees as follows:

3.1 Compliance with Laws. Mortgagor will promptly and faithfully comply with, conform to and obey all present and future laws, ordinances, rules, regulations and requirements of every duly constituted governmental authority or agency and of every Board of Fire Underwriters having jurisdiction, or similar body exercising similar functions, which may be applicable to it or to the Mortgaged Property, or any part thereof, or to the use or manner of use, occupancy, possession, operation, maintenance, alteration, repair or reconstruction of the Mortgaged Property, or any part thereof, whether or not such law, ordinance, rule, order, regulation or requirement shall necessitate structural changes or improvements or interfere with the use or enjoyment of the Mortgaged Property.

3.2 Payment of Impositions. Mortgagor will duly pay and discharge, or cause to be paid and discharged, the Impositions, such Impositions or instalments thereof to be paid not later than the day any fine, penalty, interest or cost may be added thereto or imposed by law for the non-payment thereof; provided, however, that if, by law, any Imposition may be paid in instalments, Mortgagor may pay the same in such instalments.

3.3 Repair. Mortgagor will keep the Mortgaged Property in good order and condition and make all necessary or appropriate repairs, replacements and renewals thereof and additions and betterments and improvements thereto, and will use its best efforts to prevent any act or thing which might impair the value or usefulness of the Mortgaged Property, and Mortgagor will obtain the written consent of Mortgagee prior to (a) making any alterations or additions to the Mortgaged Property which would materially diminish the value thereof or (b) removing any of the Buildings.

3.4 Insurance. Mortgagor will maintain insurance upon the Mortgaged Property against loss by fire and such other hazards, casualties and contingencies as are normally and usually covered by extended coverage policies in effect in the locality where the Mortgaged Property is situated and such other risks as may be specified by Mortgagee, from time to time, in amounts and with insurers acceptable to Mortgagee.

3.5 Restoration Following Casualty. In the event of the happening of any casualty of any kind or nature (whether insured against or not) resulting in damage to or destruction of the Mortgaged Property, Mortgagor will give notice thereof to Mortgagee, and Mortgagor will promptly restore, repair, replace, rebuild or alter the Mortgaged Property as nearly as possible to its value and condition immediately prior to such damage or destruction.

3.6 Performance of Leases and Other Agreements. Mortgagor will duly and punctually perform all covenants and agreements expressed as binding upon it under the Leases and other agreements to which it is a party with respect to the Mortgaged Property or any part thereof.

3.7 Inspection. Mortgagor will permit Mortgagee, at all reasonable times, to inspect the Mortgaged Property.

3.8 Hold Harmless. Mortgagor will defend and hold Mortgagee harmless from any action, proceeding or claim affecting the Mortgaged Property, or the value of the Note or the Security Documents.

3.9 Books and Records. Mortgagor will maintain full and complete books of account and other records reflecting the results of its operations (in conjunction with its other operations as well as its operations of the Mortgaged Property), in accordance with generally accepted accounting principles, and furnish or cause to be furnished to Mortgagee such financial data as Mortgagee shall, from time to time, reasonably request with respect to Mortgagor and the ownership and operation of the Mortgaged Property, and Mortgagee shall have the right, at reasonable times and upon reasonable notice, to audit Mortgagor's books of account and records.

3.10 Payment of Rents. Mortgagor hereby agrees that the respective tenants under the Leases, upon notice from Mortgagee of the occurrence of an Event of Default, shall thereafter pay to Mortgagee the Rents due and to become due under the Leases without any obligation to determine whether or not such an Event of Default does in fact exist. Until the occurrence of an Event of Default, Mortgagor shall be entitled to collect the Rents as and when they become due and payable, but never more than two months in advance.

3.11 Awards. Mortgagor will file and prosecute its claim or claims for any Awards in good faith and with due diligence and cause the same to be collected and paid over to Mortgagee, and hereby irrevocably authorizes and empowers Mortgagee, if it so desires, to file such claim and collect any Awards and agrees that the proceeds of any Awards will be applied by Mortgagee in reduction of any portion of the Indebtedness as Mortgagee may determine.

Article 4

EVENTS OF DEFAULT

The term "Event(s) of Default" as used in the Security Documents and in the Note, shall mean the occurrence or happening, from time to time, of any one or more of the following:

4.1 Payment of Indebtedness. If Mortgagor shall default in the due and punctual payment of all or any portion of any instalment of the Indebtedness as and when the same shall become due and payable, whether at the due date thereof or at a date fixed for prepayment or by acceleration or otherwise, and such default shall continue for a period of five (5) days after written notice thereof by Mortgagee to Mortgagor.

4.2 Performance of Obligations. If Mortgagor shall default in the due observance or performance of any of the Obligations other than payment of money and such default shall not be curable, or if curable shall continue for a period of fifteen (15) days after written notice thereof from Mortgagee to Mortgagor (unless such default, if curable, requires work to be performed, acts to be done or conditions to be remedied which by their nature cannot be performed, done or remedied, as the case may be, within such fifteen (15) day period and Mortgagor shall commence to cure such default within such fifteen (15) day period and shall thereafter diligently and continuously process the same to completion).

4.3 Bankruptcy, Receivership, Insolvency, etc. If Mortgagor shall commit an act of bankruptcy within the meaning of the Federal Bankruptcy Act, or bankruptcy, receivership, insolvency, reorganization, dissolution, liquidation or other similar proceedings shall be instituted by or against Mortgagor with respect to all or any part of Mortgagor's property under the Federal Bankruptcy Act or other law of the United States or of any state or other competent jurisdiction, and if such proceedings are instituted against Mortgagor, it shall consent thereto or shall fail to cause the same to be discharged within sixty (60) days.

4.4 Laws Affecting Obligations and Indebtedness. If subsequent to the date of this Mortgage, the state in which the Mortgaged Property is located passes any law (a) which renders payment of the Indebtedness and or performance of the Obligations by Mortgagor unlawful, or (b) which prohibits Mortgagee from exercising any of its rights and remedies under the Security Documents

DEFAULT AND FORECLOSURE

5.1 Remedies. If an Event of Default shall occur and be continuing, Mortgagee may, at its option, exercise one or more or all of the following remedies:

5.1.1 Acceleration. Declare the unpaid portion of the Indebtedness to be immediately due and payible, without further notice or demand (each of which hereby is expressly waived by Mortgagor), whereupon the same shall become immediately due and payable.

5.1.2 Receiver. Apply at any time to a court having jurisdiction for the appointment of a receiver of the Mortgaged Property and of the Rents and Leases, and such appointment shall be made by the court as a matter of strict right to Mortgagee and without reference to the adequacy or inadequacy of the security or value of the Mortgaged Property, or to the solvency or insolvency of Mortgagor, and the Rents shall be applied by the receiver to the payment of the Indebtedness, as provided in Section 5.4 hereof, or as otherwise ordered by the court.

5.1.3 Foreclosure and Private Sale. Sell the Mortgaged Property, in whole or in part, (a) under the judgment or decree of a court of competent jurisdiction, or (b) at public auction (if permitted by the laws of the jurisdiction in which the Mortgaged Property is situated) in such manner, at such time or times and upon such terms as Mortgagee may determine, or as provided by law, and/or sell the Personalty and/or the Fixtures, in whole or in part, at one or more public or private sales, in such manner, at such time or times and upon such terms as Mortgagee may determine, or as provided by law.

5.1.4 Other. Exercise any other remedy specifically granted under the Security Documents or now or hereafter existing in equity, at law, by virtue of statute or otherwise.

5.2 Remedies Cumulative and Concurrent. The rights and remedies of Mortgagee as provided in the Note and in the Security Documents shall be cumulative and concurrent and may be pursued separately, successively or together against Mortgagor or against other obligors or against the Mortgaged Property, or any one or more of them, at the sole discretion of Mortgagee, and may be exercised as often as occasion therefor shall arise. The failure to exercise any such right or remedy shall in no event be construed as a waiver or release thereof.

5.3 Waiver of Redemption, Notice, Marshalling, Etc. Mortgagor hereby waives and releases (a) all benefit that might accrue to Mortgagor by virtue of any present or future law exempting the Mortgaged Property, or any part of the proceeds arising from any sale thereof, from attachment, levy or sale on execution, or providing for any appraisement, valuation, stay of execution, exemption from civil process, redemption or extension of time for payment, (b) unless specifically required herein, all notices of Mortgagor's default or of Mortgagee's election to exercise or Mortgagee's actual exercise of any option or remedy under the Note or the Security Documents, and (c) any right to have the Mortgaged Property marshalled.

5.4 Application of Proceeds. The proceeds of any sale of all or any portion of the Mortgaged Property and the amounts generated by any holding, leasing, operation or other use of the Mortgaged Property shall be applied by Mortgagee in the following order:

(a) first, to the payment of the costs and expenses of taking possession of the Mortgaged Property and of holding, using, leasing, repairing, improving and selling the same, including without limitation payment of legal expenses and fees of a receiver;

(b) second, to the payment of accrued and unpaid interest on the Note; and

(c) third, to the payment of the balance of the Indebtedness.

The balance, if any, shall be paid to the parties entitled to receive it.

Article 6

MISCELLANEOUS

6.1 Security Agreement. Mortgagor hereby grants to Mortgagee a security interest under the Uniform Commercial Code as Adopted by the State in which the Personalty and Fixtures are located, in the Personalty and Fixtures, and Mortgagee shall have all rights with respect thereto afforded to it by such Code, in addition to, but not in limitation of, the other rights afforded to Mortgagee by the Security Documents.

6.2 Information. Mortgagor represents and warrants that all information, reports, papers and data given to Mortgagee with respect to Mortgagor or others obligated under the terms of the Security Documents are accurate and correct in all material respects and complete insofar as completeness may be necessary to give Mortgagor a true and accurate knowledge of the subject matter thereof.

6.3 Further Assurances. Mortgagor, upon the reasonable request of Mortgagee, will execute, acknowledge and deliver such further instruments (including, without limitation, a declaration of no set off) and do such further acts as may be necessary, desirable or proper to carry out more effectively the purpose of the Security Documents and to subject to the liens thereof any property intended by the terms thereof to be covered thereby, and any renewals, additions, substitutions, replacements or betterments thereto.

6.4 Recording and Filing. Mortgagor, at its expense, will cause the Security Documents and all supplements thereto at all times to be recorded, and filed and re-recorded and re-filed in such manner, and in such places as Mortgagee shall reasonably request, and will pay all such recording, filing, re-recording and re-filing taxes, fees and other charges.

6.5 Notice. All notices, demands, requests and other communications required under the Security Documents and the Note shall be in writing and shall be deemed to have been properly given if sent by U.S. first class mail, postage prepaid, addressed to the party for whom it is intended at the Mortgagor's Address or the Mortgagee's Address, as the case may be. Any party may designate a change of address by written notice to the other, given at least 10 days before such change of address is to become effective.

6.6 Mortgagee's Right to Perform the Obligations. If Mortgagor fails to make any payment or perform any act required by the Note or the Security Documents, Mortgagee, without any obligation so to do and without waiving any other right, remedy or recourse, may make such payment or perform such act at the expense of Mortgagor. All sums so paid by Mortgagee, and all costs incurred in connection therewith, together with interest thereon at the Defaulted Interest Rate from the date of payment, shall constitute part of the Indebtedness and shall be paid by Mortgagor to Mortgagee on demand.

6.7 Covenants Running with the Land. All covenants contained in the Security Documents shall run with the Mortgaged Property.

6.8 Severability. In case any one or more of the Obligations shall be invalid, illegal or unenforceable in any respect, the validity of the remaining Obligations shall be in no way affected, prejudiced or disturbed thereby.

6.9 Modification. The Security Documents and the terms of each of them may not be changed, waived, discharged or terminated orally, but only by an instrument or instruments in writing signed by the party against which enforcement of the change, waiver, discharge or termination is asserted.

6.10 Applicable Law. The Security Documents shall be governed by and construed according to the laws of the State in which the Mortgaged Property is located.

6.11 Prior Mortgage. This Section 6.11 shall be applicable only if this Mortgage is not a first lien on the Mortgaged Property. Mortgagor will not, without the prior written consent of Mortgagee, enter into or obtain any agreement written or oral, whereby the holder of any mortgage which is prior in lien to this Mortgage (herein called the "Prior Mortgage") waives, extends, postpones, reduces, increases or otherwise modifies the payment of any instalment of principal and/or interest, or any other item or amount required to be paid under the terms of the Prior Mortgage, or in any way modifies any other provisions thereof. If Mortgagor shall fail to make any payment or perform any act required by the Prior Mortgage, then, at any time thereafter, without notice to or demand upon Mortgagor and without waiving or releasing any obligation or default, Mortgagee may make such payment or perform such act for the account of and at the expense of Mortgagor, and shall have the right to enter the Mortgaged Property for such purpose and to take all such action thereon with respect thereto as may be necessary or appropriate for such purposes. All sums so paid by Mortgagee and all costs incurred in connection therewith, together with interest thereon at the Defaulted Interest Rate from the date of payment, shall constitute part of the Indebtedness, and shall be paid by Mortgagor to Mortgagee on demand. Mortgagor shall deliver to Mortgagee a copy of any notice received from the holder of the Prior Mortgage and/or sent by Mortgagor thereto.

6.12 Additional Covenants, Conditions and Agreements. The covenants, conditions and agreements set forth in Schedule C attached hereto are, by reference thereto, made a part hereof.

IN WITNESS WHEREOF, Mortgagor,

~~[illegible] has caused this Mortgage to be executed in its name by its [illegible] President, pursuant to a resolution of its Board of Directors duly adopted for the purpose, and its corporate seal to be hereunto affixed and attested by its [illegible] Secretary, on the day and year first above written.~~

Harrison Sherman Holland, Jr. has executed this Mortgage on the day and year first above written.

Signed, sealed and delivered
in the presence of:

John Burdette Baker

Robert G. Gordon

Harrison Sherman Holland, Jr.

Carolyn H. Holland

ACKNOWLEDGEMENT

STATE OF ALABAMA)
Jefferson)
~~SHELBY~~ COUNTY) ss.

I Kathryn Mann Gillman, hereby certify that Harrison Sherman Holland, Jr., and Carolyn H. Holland whose names are signed to the foregoing conveyance, and who are known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, they executed the same voluntarily on the day the same bears date.

Given under my hand and seal of office this 24th day of June, 1976.

Kathryn Mann Gillman
Signature

Notary Public
Title

SF450 Jan 73

SCHEDULE A

That certain real estate located in Shelby County, Alabama, more particularly described as follows:

Commence at the Southwest corner of Southwest Quarter of Southwest Quarter of Section 25, Township 20 South, Range 3 West and run East along South line of said 1/4 - 1/4 Section 130.60 feet to Westerly right-of-way line of U.S. Highway #31; thence an angle left of 75°29' and run Northeasterly along said right-of-way line 974.0 feet to point of beginning; thence continue along said right-of-way line 400.0 feet; thence an angle left of 104°31' and run West 426.71 feet to a point on the Easterly right-of-way line of the L. & N. Railroad; thence an angle left of 83°07'30" and run Southerly along said right-of-way line 295.67 feet; thence an angle left of 82°21'30" and run East 373.77 feet to point of beginning.

SCHEDULE B

1. All taxes not yet due and payable.

2. Permit to American Telephone and Telegraph Company recorded in the office of the Judge of Probate of Shelby County, Alabama, in Deed Book 168, page 476.

3. Right of way to Shelby County recorded in the office of the Judge of Probate of Shelby County, Alabama, in Deed Book 169, page 59.

4. Line Permit to Alabama Power Company recorded in the Probate Office of Shelby County, Alabama, in Deed Book 299, at page 128.

5. Mineral and mining rights excepted.

SCHEDULE C

6.13 Junior Financing. Without the prior written consent of Mortgagee, Mortgagor will not incur any additional indebtedness or create or permit to be created or to remain, any mortgage, pledge, lien, encumbrance or charge on, or conditional sale or other title retention agreement, whether prior or subordinate to the liens of the Security Documents, with respect to the Mortgaged Property or any part thereof or income therefrom, other than the Security Documents and the Permitted Encumbrances.

6.14 Possession of Mortgaged Property. If for any reason the Mortgaged Property ceased to be used or occupied by a person or entity who or which is a party to a duly authorized and validly existing Sales Agreement with Ford Marketing Corporation, then in such event Mortgagee may, at its option, declare the unpaid portion of the Indebtedness immediately due and payable, without further notice or demand (each of which is hereby expressly waived by Mortgagor).

6.15 Scope of Indebtedness. This Mortgage shall secure only the principal of and interest due on the Note, the amounts required to be paid by Mortgagor under the Mortgage, and each payment made by Mortgagee to preserve the lien of the Mortgage and to enforce its rights and remedies under the Mortgage.

Ford Motor Credit Company

The American Road
Dearborn, Michigan 48121

May 28, 1981

Charles L. Denaberg, Esquire
Denaberg, School, Meyerson & Ogle
1000 Brown Marx Building
Birmingham, Alabama 35203

Re: Sherman Holland

Dear Mr. Denaberg:

Your letter of May 21, 1981 to our branch office has been referred to me for response. I have reviewed this matter with our management. Mr. Clemmer's letter of May 6, 1981 to Mr. Holland fully sets forth the Company's position. Ford Credit will consider renewal of the balloon payment at our current interest rate if Mr. Holland applies for such renewal. If Mr. Holland decides not to request renewal on this basis, he should make arrangements to pay the balloon payment when it becomes due on June 29, 1981.

Very truly yours,

George V. Durbach
Associate Counsel - Litigation

/ld

IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA
EQUITY DIVISION

HARRISON SHERMAN HOLLAND, JR., CAROLYN M. HOLLAND, and SHERMAN HOLLAND FORD, INC.,	)	
PLAINTIFFS,	)	
VS.	)	CIVIL ACTION NO. CV-81-155
FORD MOTOR CREDIT COMPANY, a corporation; et al. DEFENDANTS.	)	

TEMPORARY RESTRAINING ORDER

This cause coming on to be heard on Motion for Temporary Restraining Order without notice to Defendants, and upon Affidavit of Plaintiffs and Certificate of their attorney; and the court having considered said Motion and supporting Affidavit and Certificate,

IT IS, THEREFORE, ORDERED, DECREED AND ADJUDGED BY THE COURT AS FOLLOWS:

1. That declaration of a default in the said note and mortgage is hereby restrained until such time as a preliminary hearing can be held in this cause.

2. That said preliminary hearing is hereby set on the 1 day of July, 1981, at 9 o'clock A M. in Room _____ of the Shelby County Courthouse, Columbiana, Alabama.

3. Security for said restraining order is hereby set at $ 500, which security shall be obtained through a commercial bonding company or through individual sureties with sufficient assets to cover the amount of said security.

DONE AND ORDERED this 26 day of June, 1981.

R. Armstrong
CIRCUIT JUDGE
IN EQUITY SITTING

FILED IN OFFICE THIS THE 26th DAY
OF June, 1981
Kyle Langford
Clerk of Circuit Court
Shelby County, Alabama

10274-CLD

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

FILED
1981
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
JAMES E. VANDEGRIFT, CLERK

HARRISON SHERMAN HOLLAND, JR., CAROLYN M. HOLLAND, and SHERMAN HOLLAND FORD, INC.,

Plaintiffs,

vs.

FORD MOTOR CREDIT COMPANY,

Defendant.

CIVIL ACTION NO. CV81 L 1009S

PETITION TO REMOVE TO THE
AFORESAID UNITED STATES DISTRICT COURT

Comes now the petitioner, Ford Motor Credit Company, a corporation (hereinafter "Ford Motor Credit"), defendant in the above-styled cause, and files this verified petition for removal of this cause from the Circuit Court of Shelby County, Alabama, wherein it is now pending, to the District Court of the United States for the Southern Division of the Northern District of Alabama, and shows unto this Court the following:

1. This cause was commenced in the Circuit Court of and for Shelby County, Alabama on June 26, 1981 by the filing of Motion to Appoint Process Server, Motion for a Temporary Restraining Order, Temporary Restraining Order, Motion for a Setting of Preliminary Hearing, Affidavit of Harrison Sherman Holland, Jr. and Carolyn M. Holland, Certificate of Counsel, Summons, Complaint for Declaratory Relief and Reformation and all of the Exhibits attached thereto.

2. Plaintiffs Harrison Sherman Holland, Jr. and Carolyn M. Holland were at all times relevant hereto, residents

and citizens of the State of Alabama. Plaintiff Sherman Holland Ford, Inc. is a corporation organized and existing under the laws of the State of Alabama with its principal place of business in Alabaster, Shelby County, Alabama.

3. Defendant Ford Motor Credit is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Dearborn, Michigan.

4. The subject matter of this action is a promissory note executed by Harrison Sherman Holland, Jr. and Carolyn M. Holland by the terms of which Harrison Sherman Holland, Jr. and Carolyn M. Holland promised to pay to Ford Motor Credit Four Hundred Seventy Thousand and no/100 Dollars ($470,000.00) together with interest on the unpaid balance thereof outstanding at the rate of 9.25% per annum. Payment was to be made in 59 successive monthly installments of Four Thousand Six Hundred Fourteen and no/100 Dollars ($4,614.00) each, commencing one month after the execution of the note and continuing each month thereafter for 59 successive months. On the fifth anniversity of the date of the execution of the note, a final payment consisting of the remaining balance of the principal sum together with all accrued interest thereon was to be paid to Ford Motor Credit. Said promissory note was secured by a mortgage and other security documents executed contemporaneously with the execution of the promissory note. The mortgage covered certain real property situated in the city of Alabaster, Shelby County, Alabama.

5. Ford Motor Credit has demanded the payment of the final payment under the terms of the promissory note.

In the alternative, Ford Motor Credit has informed plaintiffs that it will consider renewal of the final payment at Ford Motor Credit's current interest rate if application for such renewal is made.

6. Plaintiffs maintain that in the negotiation of the note and in the explanation of the closing documents, Ford Motor Credit or its agent represented to plaintiffs that despite the language contained in the note, that payment of the $470,000.00 at a rate of 9.25% interest with payments of $4,614.00 would be not for a 5-year term, but rather for a 20-year term. Plaintiffs seek as relief a declaration by the Court that the plaintiffs be allowed to pay the principal balance due under the promissory note and mortgage in equal monthly installments at 9.25% per annum amortized over a 20-year term, as said term relates back to June 29, 1976. In addition, plaintiffs demand a reformation of the note and mortgage so as to require payment of the unpaid balance at an interest rate of 9.25% per annum amortized and payable over a 20-year term relating back to June 29, 1976.

7. The subject matter of this action, the demand by Ford Motor Credit for the final payment of the promissory note, involves an amount in excess of $10,000.00 exclusive of costs and interest, and is actually between citizens of diverse states.

8. Ford Motor Credit is the sole holder of the said promissory note and is the sole mortgagee of the said mortgage and is the sole entity to whom payments are due under the terms and provisions of the note and mortgage.

Although Ford Motor Credit absolutely denies the material allegations in the Complaint for Declaratory Relief and Reformation, Ford Motor Credit is the party attempted to be described by the fictitious defendants designated and described in plaintiffs' complaint. Ford Motor Credit has not heretofore assigned or transferred to any other person, party or entity all or a part of any interest or claim in the promissory note or mortgage. Such fictitious defendants in the complaint describing the persons, firms or corproations having an interest in the note and mortgage describe your petitioner; all other purported fictitious defendants do not describe identifiable persons who are citizens of the State of Alabama. Should it be asserted that the fictitious defendants are other than Ford Motor Credit or are Alabama residents, then such fictitious defendants have been fraudulently designated and joined in plaintiffs' complaint for the purpose of fraudulently precluding removal to, and the denial of Ford Motor Credit of access to, this Court.

9. This is an action over which the District Courts of the United States would have original jurisdiction under the provisions of Title 28, United States Code, §1332, in that it is a civil action between citizens of different states wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs. Therefore, this action may be removed to this Court by petitioner pursuant to the provisions of Title 28, United States Code, §1441.

10. Petitioner, desiring to remove this cause to the Southern Division for the Northern District of Alabama, being the district and division of said Court for the county

in which said action is pending, offers herewith bond with good and sufficient surety, conditioned that petitioner will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that said cause is not removable, or was improperly removed.

11. A copy of the petition is being filed with the Clerk of the Circuit Court of Shelby County, Alabama, as provided by law.

12. A copy of the Motion to Appoint Process Server, Motion for a Temporary Restraining Order, Temporary Restraining Order, Motion for a Setting of Preliminary Hearing, Affidavit of Harrison Sherman Holland, Jr. and Carolyn M. Holland, Certificate of Counsel, Summons, Complaint for Declaratory Relief and Reformation and all of the Exhibits attached thereto, being all the process and pleadings served upon petitioner in this action, is attached hereto.

WHEREFORE, petitioner prays that this Court will consider this petition and bond file herewith conditioned as provided by law governing the removal of causes to this Court; that this Court will make the proper orders or action to effect the removal of this cause from said Circuit Court of Shelby County, Alabama to this Court; and that this Court will make such other orders or take requisite action as may be appropriate to effect the preparation and filing of a

true record in this cause of all proceedings that may have been had in the said Circuit Court.

This the 30th day of June, 1981.

Attorneys for Defendant, Ford Motor Credit Company

OF COUNSEL:

Hobart A. McWhorter, Jr.
Jere F. White, Jr.

BRADLEY, ARANT, ROSE & WHITE
1500 Brown-Marx Building
Birmingham, Alabama 35203
(205) 252-4500

STATE OF ALABAMA)
:
JEFFERSON COUNTY)

Before me, a notary public in and for said county in said state, personally appeared Jere F. White, Jr., who having been by me first duly sworn, deposes and says that he is one of the attorneys of record for defendant-petitioner, Ford Motor Credit Company, a corporation; that he is authorized to file the petition on behalf of said petitioner; and that the matters and things stated in the foregoing petition are true and correct according to his present knowledge, information and belief, and that he is competent to make this affidavit.

Jere F. White, Jr.

Sworn to and subscribed before me this 30th day of June, 1981.

Notary Public

[NOTARIAL SEAL]

My Commission expires: September 25, 1984

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Removal and a copy of the removal bond have been served upon Charles L. Denaburg, Esquire and Rodney A. Max, Esquire, by directing same to his office through the United States mail, postage prepaid and properly addressed on this the 30th day of June, 1981.

I hereby certify that a copy of the foregoing Petition for Removal and a copy of the removal bond have been forwarded to the Clerk of the Circuit Court of Shelby County, Alabama, by directing a copy of same by hand on this the 30th day of June, 1981.

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

FILED
JUL 23 1981
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
JAMES E. VANDEGRIFT, CLERK

HARRISON SHERMAN HOLLAND, JR., et al.,

Plaintiffs,

vs.

FORD MOTOR CREDIT COMPANY, a corp., et al.,

Defendants.

CIVIL ACTION

CV 81-L-1009-S

ENTERED
JUL 23 1981

ORDER

This cause, coming on to be heard on July 22, 1981, at a regular motion docket in Birmingham, Alabama, was presented to the Court upon plaintiffs' motion for clarification of a temporary restraining order. It appearing to the Court that the parties agree to extend the temporary restraining order entered by the Circuit Court of Jefferson County until August 14, 1981, that Judge Armstrong of that court recognized and acceded to that agreement, and that the parties ahve since agreed to extend the temporary restraining order until September 30, 1981,

It is ORDERED, ADJUDGED and DECREED by the Court that the declaration of default on the said note and mortgage that is the subject of this action be and the same is hereby restrained until September 30, 1981.

DONE this 22nd day of July, 1981.

Seybourn H. Lynne
SENIOR JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

FILED
JAN 8 1982
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
JAMES E. VANDEGRIFT, CLERK

HARRISON SHERMAN HOLLAND, JR., CAROLYN M. HOLLAND, and SHERMAN HOLLAND FORD, INC., PLAINTIFFS,	
VS.	CIVIL ACTION NO. CV 81-L-1009-S
FORD MOTOR CREDIT COMPANY, et al., DEFENDANTS.	

MOTION TO AMEND AND SUPPLEMENT PLEADINGS

Come now Plaintiffs, Harrison Sherman Holland, Jr., Carolyn M. Holland and Sherman Holland Ford, Inc., and move this Court, pursuant to Rule 15 FRCP, to amend and/or supplement pleadings as set forth hereinbelow:

COUNT THREE - - FRAUD
(Alabama Code of 1975, Section 6-5-101)

1. Plaintiffs incorporate each and every allegation and averment of Counts One and Two in support of Count Three.

2. From August, 1975 through June, 1976, Defendant and Plaintiffs negotiated and agreed upon the financing of the construction of a Ford dealership in Alabaster (Shelby County), Alabama.

3. At the time of these negotiations and agreement, Defendant represented to Plaintiff that the financing would be in the amount of $470,000.00 with an interest rate of 9-1/4%, payable over a period of twenty years. Defendant represented to Plaintiffs that the Note which they would sign would set forth terms evidencing a five year term with a balloon payment at the end of six years, but that the Note would, in fact, be payable over twenty years. The Defendant represented to Plaintiffs that the contrary language of the Note was according to the policies set forth by the Defendant, but that so long as the Plaintiffs remained the makers of the Note that the Note would be payable at the same rate over the entire twenty year period.

4. The representations made by the Defendant were false and the Defendant knew they were false; or,alternatively, Defendant without knowledge of the true facts, recklessly misrepresented them; or, alternatively, they were made by mistake but with the intention that the Plaintiffs should rely upon them.

5. Plaintiffs believed the representations of the Defendant and in reliance upon them entered into the Note and Mortgages set forth in Exhibits A and B attached to the Complaint.

6. Plaintiffs aver that the fraud which induced them to enter into said Note and Mortgage was malicious, oppressive and/or gross and that the representations were made with knowledge of their falsity.

7. Said misrepresentation was not discovered until March (or April), 1981, at which time Defendant, by and through its agents, notified Plaintiffs of its intention to require the full payment of the Note or re-negotiation thereof at a rate effective at the time of renewal, which approximated 22.5% in June of 1981.

8. Plaintiffs aver that as a result of said misrepresentations they have suffered direct, indirect, incidental and consequential damages in the amount of $500,000.00.

WHEREFORE, THE ABOVE PREMISES CONSIDERED, Plaintiffs pray that this Honorable Court will grant the Motion to Amend adding Count Three to the Complaint requiring the Defendant to answer as required by law or alternatively suffer default, and that upon final hearing of this cause that Plaintiffs be awarded from the Defendant the sum of $500,000.00 plus interest, and punitive damages in the amount of $1,500,000.00 plus the court costs incurred herein.

COUNT FOUR - - DECEIT
(Alabama Code of 1975, Section 6-5-103)

1. Plaintiffs incorporate each and every allegation and averment set forth in Counts One, Two and Three in support of Count Four.

2. Defendant concealed from Plaintiffs the requirement of re-negotiation of the Note at a rate effective at the time of renewal.

3. Said concealment was done in such a manner as to deceive and mislead Plaintiffs.

4. Said concealment was done knowingly, or without knowledge but with the intent to deceive Plaintiffs and/or with reckless disregard for the truth thereof.

5. Plaintiffs entered into the subject Note and Mortgage without knowledge of the concealed facts and had said facts been known to them they would not have entered into said Note and Mortgage. Plaintiffs had expressly informed Defendant of the need for a "level pay" at the rate of 9-1/4% over the full twenty year period. Defendant, by and through its agents, knew that Plaintiffs would not enter into a Note and Mortgage that required re-negotiation of the interest rate at the end of the five year period.

6. As a result of said concealment, Plaintiffs have suffered direct, indirect, incidental and consequential damages in the amount of $500,000.00.

7. Said concealment was committed willfully, maliciously and/or with reckless disregard of the rights of Plaintiffs.

WHEREFORE, THE ABOVE PREMISES CONSIDERED, Plaintiffs pray that this Honorable Court will grant the Motion to Amend adding Count Four to the Complaint requiring the Defendant to answer as required by law or alternatively suffer default, and that upon final hearing of this cause that Plaintiffs be awarded from the Defendant the sum of $500,000.00 plus interest, and punitive damages in the amount of $1,500,000.00 plus the court costs incurred herein.

COUNT FIVE - - FRAUDULENT DECEIT
(Alabama Code of 1975, Section 6-5-104)

1. Plaintiffs incorporate each and every allegation and averment set forth in Counts One, Two, Three and Four in support of Count Five.

2. Plaintiffs aver that Defendant willfully deceived them with intent to induce them to enter into a Note and Mortgage which they would not have entered into had they (Plaintiffs) known the facts as disclosed to them by Defendant, by and through its agents, in March (or April), 1981.

3. Said deceit was practiced upon Plaintiffs by suggestion of facts which were not true by duly authorized agents of Defendant,who did not believe it to be true; or, alternatively, by the assertion of facts which were not true by duly authorized agents of Defendant who had no reasonable grounds for believing said facts to be true; or, alternatively, by suppression of facts by duly authorized agents of Defendant who gave information of other facts relating to the payment of the Note which were likely to mislead for want of full disclosure of the re-payment as now represented by the Defendants; or, alternatively, by a promise and agreement made in the negotiation of the Note which was made without any intention of performing it.

4. Plaintiffs entered into the Note and Mortgage in reliance upon the suggestion, assertion of facts, absence of presently disclosed information, and the promise and agreement made with the Defendant, by and through its agents.

5. As a result of said fraudulent deceit, Plaintiffs have suffered direct, indirect, incidental and consequential damages in the amount of $500,000.00.

WHEREFORE, THE ABOVE PREMISES CONSIDERED, Plaintiffs pray that this Honorable Court will grant the Motion to Amend adding Count Five to the Complaint requiring the Defendant to answer as required by law or alternatively suffer default, and that upon final hearing of this cause that Plaintiffs be awarded from the Defendant the sum of $500,000.00 plus interest, and punitive damages in the amount of $1,500,000.00 plus the court costs incurred herein.

COUNT SIX - - TORT A BAD FAITH

1. Plaintiffs incorporate each and every allegation and averment set forth in Counts One, Two, Three, Four and Five in support of Count Six.

2. Plaintiffs aver that they have delivered to Defendant taped recordings of the negotiations and agreement which are the substantial averments set forth by Plaintiffs hereinabove.

3. Despite the Defendants receipt and review of these taped conversations substantiating Plaintiffs allegations, Defendant has refused to honor the commitments made by itself and/or its agents.

4. Plaintiffs aver that with actual knowledge of the negotiations and agreement entered into between Plaintiffs and Defendant, by and through its agents, there is no lawful basis for the Defendant to refuse to honor the terms of the Note as negotiated by itself, by and through its agents.

5. Plaintiffs aver that Defendant has wantonly, willfully, maliciously and with intent to oppress Plaintiff, refused to honor the agreement as evidenced by said taped conversations.

6. Plaintiffs aver that Defendant has breached an implied duty of good faith and fair dealing and that said breach has been exercised willfully, maliciously and in reckless disregard of the rights of the Plaintiffs.

7. Plaintiffs aver that as a result of Defendants' conduct, they have suffered direct, indirect, incidental and consequential damages in the amount of $500,000.00.

WHEREFORE, THE ABOVE PREMISES CONSIDERED, Plaintiffs pray that this Honorable Court will grant Plaintiffs Motion to Amend and Supplement the Pleadings by the addition of Count Six and that upon doing so, require the Defendant to answer said Count as required by the rules of this Court; and that upon failing to do so, enter default judgment herein; and that, upon final hearing of this cause, that this Court award to Plaintiffs the sum of $500,000.00 plus interest, and punitive damages in the amount of $1,500,000.00, plus court costs incurred herein.

DENABURG,SCHOEL,MEYERSON,OGLE,ZARZAUR & MAX
Attorneys at Law
2125 Morris Avenue
Birmingham, AL 35203

By: _____
CHARLES L. DENABURG

By: _____
RODNEY A. MAX

Plaintiffs request jury trial for Counts Three,Four,Five and Six.

CERTIFICATE OF SERVICE

I hereby certify that I have this 8th day of January, 1982,hand-delivered

a copy of the above and foregoing Motion to Amend and Supplement Pleadings to Mr. Jere White, attorney for the Defendant, at his office, 1400 Park Place Tower, Birmingham, Alabama.

Rodney A. Max

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

HARRISON SHERMAN HOLLAND, JR., CAROLYN M. HOLLAND, AND SHERMAN HOLLAND FORD, INC., Plaintiffs,	)	
v.	)	CIVIL ACTION NO. CV 81-L-1009-S
FORD MOTOR CREDIT COMPANY, et al., Defendants.	)	

MOTION TO DISMISS
OR IN THE ALTERNATIVE TO STRIKE
PLAINTIFFS' MOTION TO AMEND AND SUPPLEMENT PLEADINGS

Ford Motor Credit Company, a corporation ("Ford Credit"), moves the Court to dismiss or alternatively to strike the complaint, as amended and supplemented, and each count and claim therein, separately and severally, on the following grounds, separately and severally assigned:

1. There is a failure therein to state a claim against Ford Credit upon which relief can be granted.

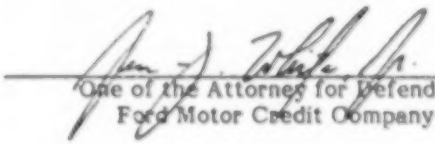
2. There is a failure therein to state a claim against Ford Credit upon which relief can be granted in that plaintiffs' claims are barred by the statute of limitations of one year.

3. Plaintiffs have not experienced or incurred any damage or injury as a result of any conduct or act on the part of Ford Credit.

4. The claim asserted in Count Five, purportedly stating a cause of action against Ford Credit for the tort of bad faith, is not maintainable against Ford Credit in that the relationship of Ford Credit and plaintiffs was not that of insurer and insured.

5. Any refusal to acquiesce in or to honor any alleged agreement as evidenced by any tape recording fails to state a cause of action against Ford Credit sounding in tort.

6. Ford Credit moves to strike the jury demand on the grounds that it is untimely in that Counts Three, Four and Five are merely reiterations of Count Two of the original complaint, in which no jury was demanded, and more than 30 days has elapsed since the filing of the original complaint.



One of the Attorneys for Defendant
Ford Motor Credit Company

OF COUNSEL:

BRADLEY, ARANT, ROSE & WHITE
1400 Park Place Tower
Birmingham, Alabama 35203

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion has been served upon Charles L. Denaburg, Esquire and Rodney A. Max, Esquire, by forwarding a copy thereof through the United States mail, postage prepaid, addressed to them c/o DENABURG, SCHOEL, MEYERSON, OGLE, ZARZAUR & MAX, 2125 Morris Avenue, Birmingham, Alabama 35203, on this 21st day of January, 1982.

HARRISON SHERMAN HOLLAND, JR.,)
CAROLYN H. HOLLAND, and)
SHERMAN HOLLAND FORD, INC.,)
)
Plaintiffs,)
vs.) CIVIL ACTION
)
FORD MOTOR CREDIT COMPANY,)
et al.,)
)
Defendants.)

O R D E R

This cause, coming on to be heard at motion docket on February 6, 1982, was submitted to the Court on Defendant's motion to dismiss the amplified and amended complaint of the plaintiffs' jury demand with respect to Counts Six, Seven, and Nine of the amended complaint. After considering the pleadings and the memoranda addressed to the jury issue submitted by counsel, the Court is of the opinion that the motion to dismiss should be granted with respect to Count Six of the amended complaint and that the jury demand should be stricken.

In Count Six, plaintiffs seek to recover in tort for the breach of an implied duty of good faith and fair dealing," a theory of recovery better known as the "tort of bad faith." This theory of recovery, however, is applicable only in the insurance contract context. Brown Barx Associates, Ltd. v. Citizens Savings Bank, No. CV 79-PT-1423-S (N.D. Ala., memorandum opinion entered Dec. 1, 1981)(Propst, J.). Since this action does not involve an insurance contract, Count Six must be dismissed.

The right to a jury trial in the amended complaint must be stricken as untimely. The issues presented in the additional claims based on fraud and deceit were raised in the original complaint and the failure to demand a jury trial in a timely manner will not give rise to a demand for a jury trial." Higgins v. Colville, 540 F.2d 748, 751 (5th Cir. 1976). The

[illegible] first in this case [illegible] only a [illegible] of recovery and form of relief.

Plaintiffs' argument that the original complaint presented only equitable issues as to which no jury could have been demanded and thus that there could be no waiver of jury trial is attractive but unsound. As a leading authority has stated,

> [D]espite the seeming logic of this position, the better analysis is to the contrary. The party is claiming all along that one set of circumstances entitles him to help from the court. If these circumstances give rise to any issue on which the Constitution requires a jury trial, the party should have demanded a jury trial at the outset and should not be able to abjure the right previously waived.

C. Wright & A. Miller, Federal Practice and Procedure § 2320 (1971); see also [illegible] v. United States, 376 F.2d 49 (9th Cir. 1967). Plaintiffs' argument that they can at least obtain a jury trial on the issue of damages fails for the same reason.

Finally, the Court declines, in the exercise of its discretion, to accept plaintiffs' suggestion that a jury be empaneled under Fed. R. Civ. P. 39(c). This request for a jury is not a case of excusable inadvertence but appears to be only a belated change of strategy.

It is accordingly ORDERED, ADJUDGED and DECREED by the Court that Count Six of the amended complaint be and the same is hereby dismissed and that the demand for trial by jury be and the same is hereby stricken. Defendant's motion to dismiss is denied in all other respects.

DONE this 3rd day of March, 1972.

[illegible]

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
MAR 29 1982
NORMAN E. ZOLLER
CLERK

HARRISON SHERMAN HOLLAND, JR.,
CAROLYN M. HOLLAND, and
SHERMAN HOLLAND FORD, INC.,

PETITIONERS,

VS.

CASE NO. CV81-L-1009-S

HONORABLE SEYBOURN H. LYNNE,
JUDGE OF THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF ALABAMA, SOUTHERN
DIVISION,

RESPONDENT.

PETITION FOR WRIT OF MANDAMUS

The above named petitioners, Harrison Sherman Holland, Jr., Carolyn M. Holland and Sherman Holland Ford, Inc., herein apply, pursuant to Section 1651, Title 28, United States Code, and Rule 21(a) of the Federal Rules of Appellate Procedure, for a writ of mandamus directed to the above-named respondent, the Honorable Seybourn H. Lynne, Judge of the United States District Court for the Northern District of Alabama, Southern Division. In support of this application petitioners state:

I. Order and Opinion Below.

On the 3rd day of March, 1982, respondent made and entered an order denying petitioners' demand for a jury trial under Rule 38 and 39(b) of the Federal Rules of Civil Procedure. Said order is attached hereto as Exhibit "A" and is incorporated herein as if fully set forth.

II. Statement of Facts.

The facts necessary to an understanding of the issues presented by this application are as follows:

A. Petitioners filed a Complaint for Declaratory Relief and Reformation in the Circuit Court of Shelby County, Alabama, Equity Division, on the 26th day of June, 1981 (attached as Exhibit "B" and incorporated herein as if fully set forth). The Complaint sought equitable relief with regard to a note and mortgage executed by petitioners with Ford Motor Credit Company (Defendants). The language of the note evidences a payment schedule of 59 successive monthly installments and a balloon on the fifth anniversary. Petitioners have averred that in the negotiation of the note and in execution of the closing documents the defendant through its agents represented the payment would be for a twenty year term with equal payments amortized over the full twenty year term. The Complaint was therefore filed to enjoin any default of the note, declare the rights of the parties thereunder and reform the note accordingly.

B. The Complaint was accompanied by a Motion for Temporary Restraining Order, Bond, Temporary Restraining Order and a Motion for Setting Preliminary Hearing (attached as Exhibits "C", "D", "E" and "F" and incorporated herein as if fully set forth). The Motion for Temporary Restraining Order was granted and a preliminary hearing was set for the 1st day of July, 1981, at 9:00 a.m. before the Honorable Robert Armstrong, Shelby County Circuit Judge, in Equity Sitting.

C. Defendant, Ford Motor Credit, filed a Petition to Remove to the United States District Court for the Northern District of Alabama, Southern Division, on June 30, 1981 (attached Exhibit "G" and incorporated herein as if fully set forth). Said petition for removal was accompanied by an Answer and Request for Affirmative Relief asking the United States District Court to declare the note and mortgage binding and operative on plaintiffs (petitioners herein). (Attached as Exhibit "H" and incorporated herein as if fully set forth).

D. Up to this point and through the United States District Court's issuing an Order extending the Temporary Restraining Order (attached as Exhibit "I" and incorporated herein as if fully set forth) the action was strictly equitable in nature.

E. Thereafter, discovery between the parties took place whereby documents and tapes regarding the negotiation and execution of the documents were produced (see attached Exhibits "J" and "K" and incorporated herein as if fully set forth). Pursuant to said discovery, plaintiffs (petitioners herein) discovered conversations which they had not previously heard and which evidenced the representations alleged by plaintiffs. These were made available to defendant's counsel.

F. Based upon the newly discovered evidence, plaintiffs filed a Motion to Amend and Supplement Pleadings (attached

hereto as Exhibit "L" and incorporated herein as if fully set forth). Said Motion sought to add four counts claiming compensatory and punitive damages for fraud, deceit, and fraudulent deceit and tort a bad faith. All counts claimed damages in excess of $20.00. The Motion to Amend and Supplement Pleadings was accompanied by petitioners request for jury trial for the amended counts (see Exhibit "L" - - page 3).

G. Defendant, thereafter, filed a Motion to Dismiss or in the Alternative to Strike Plaintiffs' Motion to Amend and Supplement Pleadings (attached as Exhibit "M" and incorporated herein as if fully set forth). Paragraph six of said motion moved to strike the jury demand on the grounds that it was untimely filed.

H. Memoranda of law were filed by both the plaintiffs (attached hereto as Exhibit "N" and incorporated herein as if fully set forth) and defendant (attached hereto as Exhibit "O" and incorporated herein as if fully set forth).

I. On March 3, 1982, the Respondent entered his Order refusing trial by jury under Rule 38 and 39(b) (Federal Rules of Civil Procedure, Exhibit "A" referenced above).

III. Statement of Issue Presented.

Where an action is for strictly equitable relief with regard to the negotiation, execution and payment of a note and after discovery of documents and tapes relative thereto, an

amendment is granted seeking damages for fraud and deceit in inducement into that note and damages for bad faith in threatening default of that note and a jury demand for each amended claim accompanies the amendment are plaintiffs (petitioners herein) entitled to a jury for the determination of the amended claims?

Statement of Relief Sought.

The relief sought by petitioners herein are as follows:

Trial by jury for the amended Counts Three, Four, Five and Six (Count Six has been dismissed by the Court pursuant to its Order of March 3, 1982. Petitioners do not want to waive their right to trial by jury on this issue should appeal upon final judgment render this a valid claim).

IV. Reasons Why Writ Should Issue.

The reason this writ should issue is that trial by jury in civil cases is mandated by Amendment Seven to the United States Constitution which states as follows:

> In suits at common law, where the value in controversy shall exceed Twenty Dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

With this mandate Rule 38 and 39 of the Federal Rules of Civil Procedure were promulgated. Rule 38(a) states:

> Right Preserved. The right of trial by jury is declared by the seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

Sub-section (b) of Rule 38 sets out the mechanics for requesting trial by jury:

> Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other party a demand therefore in writing at any time after the commencement of the action and not later than ten days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

In further recognition of the constitutional right to trial by jury, Rule 39(b) provides as follows:

> By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the Court; but, not withstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the Court in its discretion upon Motion may order a trial by jury of any or all issues.

The initial claims for relief in the instant case were strictly equitable in nature. There was no demand for damages in excess of $20.00 which would have otherwise triggered Amendment Seven of the United States Constitution. Petitioners state that at this very moment they have no intention or desire to have a jury decide the factual issues relevant to the declaratory relief or the reformatory relief. Rather, their demand for

trial by jury has been requested simultaneous with and only with reference to the filing of the amended claims for damages.

The respondent's reliance upon Guajardo v. Estelle, 580 F.2d 748, 753 (5th Cir.1978) is ill-founded. In that case prison inmates challenged the constitutionality of the Texas Department of Corrections' rules and regulations. In that case plaintiffs commenced the action by asking for both injunctive and declaratory relief. Thereafter they amended the Complaint seeking only declaratory relief. In the instant case petitioners amended claims sought damages, a wholly new and different aspect to the initial relief sought.

The logic of Guajardo, was as follows:

> Although they (plaintiffs) would not have been entitled to a jury trial on equitable issues, they might have demanded a jury trial on factual issues underlying the declaratory judgment action. 5 J. Moore, Federal Practice, Section 38.29. If the claims were legal, its jury-generating aspect could not be lost by joinder for equitable relief. Dairy Queen v. Wood, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.,2d 44(1962); Beacon Theatres v. Westover, 359 U.S.500, 79 S.Ct. 948, 3 L.Ed.,2d 988 (1959). Assuming that a legal claim existed, the issue is whether the state sought a jury trial within ten days from the last complaint raising it as an issue. A complaint "raises an issue" only once within Rule 38(b)'s meaning--when it introduces it for the first time. Amendments not introducing new issues will not give rise to a demand for jury trial....The record in this case reveals that the plaintiffs' amended complaints are restatements of their earlier pleadings and do not raise new issues which give rise to a demand for a jury trial. Id. at 752-753.

The respondent has concluded that the petitioners' amended complaint presents only a different theory of recovery and not new facts.

Petitioners, however, strongly assert that new issues are raised by the amended pleadings and that they do not merely represent a different theory of recovery. In fact, they seek legal damages where only equitable relief was previously sought. The facts to support these amended claims are contained in discovery which was not previously available to the petitioners at the time they filed their initial complaint.

The proof of liability for fraud, deceit and fraudulent deceit contains elements of proof (facts) which may not be necessary in an equitable ruling of declaratory or reformatory relief. Certainly the damages aspect of the amended claims is entirely different from the equitable relief initially sought.

Petitioners do not wish to merely amend the theory of recovery as was done in Guajardo from declaratory and injunctive relief to merely declaratory relief. Rather they have discovered conduct of defendant which warrant damages in addition to the equitable relief initially sought.

As distinquished from Guajardo, new issues have been raised through the amended prayers for relief. The right of trial by jury has been recognized to be dependent upon the prayer for relief. See, 5 J.Moore, Section 38.17 at 38-155.

> At times a Plaintiff, may by virtue of substantive principles, have the right to seek legal and equitable remedies cumulatively or to chose between them. While the prayer for relief, except in the case of a judgment by default, does not limit the recovery, it must necessarily have a bearing upon the right of jury trial since it indicates what remedy or remedies the Plaintiff seeks. If the Plaintiff alleges a claim and asks for damages, it is generally legal for the purpose of

> determining the right of jury trial. If the Plaintiff alleges a claim for and prays equitable relief there is no right of jury trial. As long as the complaint remains in that form the Plaintiff is not entitled to a jury trial, even though he files a formal waiver of the right to equitable relief. If, on the other hand, the Court permits the Plaintiff to amend his complaint from a pleading seeking equitable relief to a pleading seeking legal relief, the claim has then become one at law for a purpose of honoring a demand for jury. Id. at 38-155 to 158.

Certainly, in the instant case the initial complaint was strictly equitable in nature and the amended claims present new issues of fact and law relative to strictly legal claims.

The right of trial by jury as to the amended claims should have been honored. The tests by which the right of trial by jury can be measured have been the subject of Charles Allen Wright's commentary:

> This problem has perplexed the courts and bemused the commentators. They suggest variously that the whole case should be labeled as "basically legal" or "basically equitable," or that the courts should be guided by Plaintiff's preferred remedy, or that history should be resorted to for a determination as to which party could have controlled whether the case would have gone to a jury in the old practice, or that a certain issue should be identified as "basic" and the right to a jury trial made to turn on its characteristics.
>
> All such tests must fail. They attempt to use a historical test, of one form or another to classify a hybrid form of lawsuit that could never have existed in ancient days. If the problem can not be solved by history, resort must be held to policy, and the relevant policy, expressed in the seventh amendment, is favorable to jury trial. Wright, Law of Federal Courts, Section 92 at 407 (West Publishing, 2nd Edition, 1970).(Emphasis added).

Petitioners recognize and acknowledge that there exist a right of trial by jury for declaratory relief under Rule 57 FRCP. However, this does not negate the primarily equitable nature of this relief as well as that of reformatory relief. Petitioners have deliberately and knowingly waived their right of trial by jury with regard to the declaratory, reformatory and injunctive relief and maintain that position at this time. They in no way seek to make those issues jury determinative. However, as to liability for fraud, deceit and fraudulent deceit (as well as tort a bad faith) they respectfully request that the factual issues of liability and damages be tried to a jury. This is not, as the respondent has indicated "a belated change of strategy". Rather, it is a circumstance that has occurred as a result of the discovery of both petitioner and the defendant in the case. An evaluation of that discovery has now justified the amendments and the demand for jury trial.

The respondent has granted petitioners' motion for amendment for fraud, deceit and fraudulent deceit. It is both unjust, unequitable and unconstitutional that these newly allowed claims cannot be tried before a jury on the technicality that the equitable claims were initially filed and remain as non-jury claims for relief.

V. Exhibits.

Attached hereto as Exhibits and incorporated by reference herein are Exhibits "A" - "M" in which are set forth:

Exhibit "A" - Order

Exhibit "B" - Complaint for Declaratory Relief and Reformation

Exhibit "C" - Motion for Temporary Restraining Order

Exhibit "D" - Bond

Exhibit "E" - Temporary Restraining Order

Exhibit "F" - Motion for Setting of Preliminary Hearing

Exhibit "G" - Petition to Remove to the Aforesaid United States District Court

Exhibit "H" - Answer and Request for Affirmative Relief

Exhibit "I" - Order extending the Temporary Restraining Order

Exhibit "J" - Plaintiffs First Request for Production of Documents

Exhibit "K" - Ford Motor Company's First Request for Production

Exhibit "L" - Motion to Amend and Supplement Pleadings

Exhibit "M" - Motion to Dismiss or in the Alternative to Strike Plaintiffs' Motion to Amend and Supplement

Exhibit "N" - Memorandum of Law in Opposition to Motion to Strike Plaintiffs' Jury Demand

Exhibit "O" - Memorandum of Law in Support of Motion to Strike Plaintiffs' Jury Demand and Supplement to Motion to Strike Plaintiffs' Jury Demand

WHEREFORE, Petitioners respectfully pray that a Writ of Mandamus be issued by this court directed to Respondent, the Honorable Seybourn H. Lynne, Judge of the United States District

Court for the Northern District of Alabama, Southern Division, directing that the amended claims be tried by a jury, and for such other and further relief as the court may deem proper.

DATED the 24th day of March, 1982.

DENABURG,SCHOEL,MEYERSON,OGLE,ZARZAUR & MAX
Attorneys at Law
2125 Morris Avenue
Birmingham, AL 35203

By: _____
RODNEY A. MAX
Attorney for Petitioners

PROOF OF SERVICE

I hereby certify that I have this 24th day of March, 1982, served a copy of the above and foregoing Petition for Writ of Mandamus on the Honorable Seybourn H. Lynne, Judge of the United States District Court for the Northern District of Alabama, Southern Division, and Jere F. White, Jr., Attorney for Defendant, Ford Motor Credit Company, by placing a copy of same in the United States Mail, postage prepaid and properly addressed to them.

_____
RODNEY A. MAX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 82-7096

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
MAR 31 1982
NORMAN E. ZOLLER
CLERK

IN RE: HARRISON SHERMAN HOLLAND, JR., et al,

Petitioners.

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On Petition for Writ of Mandamus to the United States District Court for the Northern District of Alabama

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Before TJOFLAT, FAY and HENDERSON, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus is DENIED.